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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CASE NO. 98 Civ. 3287 (JBW)

BLUE CROSS AND BLUE SHIELD
OF NEW JERSEY, et al.,

Plaintiffs,

vs.

PHILIP MORRIS, INCORPORATED, et al.,

Defendants.

VIDEOTAPED DEPOSITION OF
THOMAS V. DiBACCO

Taken before Richard Bursky, Registered
Merit Reporter and Notary Public in and for the
State of Florida at Large, pursuant to Notice of
Taking Deposition filed by the Plaintiffs in the
above cause.

Thursday, June 22, 2000
Suite 1400
222 Lakeview Drive
West Palm Beach, Florida
10:17 a.m. - 1:58 p.m.

INTERIM COURT REPORTING

52259 8903

Appearances:

On Behalf of Plaintiff Blue Cross and
Blue Shield of New Jersey, Inc.:

DEWEY BALLANTINE, LLP
1301 Avenue of the Americas
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BY: VINCENT R. FITZPATRICK, JR., ESQ.
PAUL B. CARBERRY, ESQ.

On Behalf of Defendant Philip Morris, Inc.:

ARNOLD & PORTER
555 Twelfth Street, N.W.
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BY: WENDY LEVENSON, ESQ.

On Behalf of Defendant Philip Morris, Inc.:

JOHNSON TYLER & PURVIS, PC
11 DuPont Circle, N.W.
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(202) 667-6100

BY: JULIA J. TYLER, ESQ.

On Behalf of Defendant Lorillard Tobacco Company:

SHOOK HARDY & BACON, LLP
One Kansas City Place
1200 Main Street
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(816) 474-6550

BY: WILLIAM L. ALLINDER, ESQ.
JAMES R. ARNOLD

1

2 Appearances: (Continued)

3

On Behalf of Defendant R.J. Reynolds
Tobacco Company:

4

COLLIER SHANNON RILL & SCOTT, PLLC
3050 K Street, N.W.
Washington, D.C. 20007
(202) 342-8869

6

7

BY: WILLIAM M. BAILEY, ESQ.

8

9

ALSO PRESENT:

10

SANDY RUBIN, Videographer

11

12

I N D E X

13

14

Witness
THOMAS V. DiBACCO

Direct

15

16

By Mr. Fitzpatrick

5

17

18

EXHIBITS:

IDENTIFIED:

19

DiBacco Exhibit 1..... 13

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P R O C E E D I N G S

10:17:58 3

- - -

10:18:00 4

THE VIDEOGRAPHER: We are on the record.

10:18:02 5

This is the videotape deposition of Thomas

10:18:06 6

DiBacco in the matter of Blue Cross and Blue

10:18:08 7

Shield of New Jersey et al. versus Philip

10:18:08 8

Morris, Incorporated et al.

10:18:12 9

Today's date is June 22, 2000. The time

10:18:16 10

is 10:17 a.m. This deposition is being

10:18:20 11

conducted at 222 Lakeview Avenue, West Palm

10:18:20 12

Beach, Florida.

:18:22 13

The videographer is Sandy Rubin of Legal

10:18:24 14

Video Services, Fort Lauderdale, Florida.

10:18:26 15

The court reporter is Richard Bursky of

10:18:28 16

Interim Reporting.

10:18:28 17

Would counsel please announce their

10:18:30 18

appearances for the record.

10:18:34 19

MR. FITZPATRICK: Vincent Fitzpatrick of

10:18:34 20

Dewey Ballantine on behalf of the Blue

10:18:38 21

Cross/Blue Shield plaintiffs.

10:18:40 22

MR. CARBERRY: Paul Carberry also of Dewey

10:18:40 23

Ballantine on behalf of the Blue Cross/Blue

10:18:42 24

Shield plaintiffs.

10:18:42 25

MR. ALLINDER: William Allinder of Shook

INTERIM COURT REPORTING

52259 8906

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DiBacco

10:18:46 2 Hardy & Bacon for Lorillard Tobacco Company.

10:18:48 3 MS. TYLER: Julia Tyler of Johnson Tyler &
10:18:50 4 Purvis for Philip Morris.

10:18:50 5 MR. ARNOLD: James Arnold of Shook Hardy &
10:18:54 6 Bacon for Lorillard Tobacco Company.

10:18:56 7 MS. LEVENSON: Wendy Levenson from Arnold
10:18:58 8 & Porter for Philip Morris, Incorporated.

10:19:00 9 MR. BAILEY: William Bailey of Collier
10:19:02 10 Shannon Scott on behalf of R.J. Reynolds
10:19:04 11 Tobacco Company.

10:19:06 12 THE VIDEOGRAPHER: Swear in the witness.
13 Thereupon.

14

THOMAS V. DiBACCO,

15

being by the undersigned Notary Public first duly
sworn, was examined and testified as follows:

10:19:14 17 DIRECT EXAMINATION

18

BY MR. FITZPATRICK:

10:19:16 19 Q Good morning, Dr. DiBacco.

10:19:16 20 A Good morning, Mr. Fitzpatrick.

10:19:18 21 Q We of course previously introduced

10:19:22 22 ourselves, but again for the record, I represent the

10:19:26 23 Blue Cross/Blue Shield plaintiffs and I understand

10:19:28 24 you are proposed to testify as an expert in our

10:19:30 25 litigation and I am going to ask you some questions

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DiBacco

10:19:32 2 about that today. You understand that?

10:19:32 3 A Yes, sir.

10:19:36 4 Q I would like to start with a few questions
10:19:38 5 about your background.

10:19:40 6 Do you have any training in psychology?

10:19:44 7 A I have no training in psychology.

10:19:48 8 Q Have you ever written on the subject or
10:19:50 9 lectured on the subject of psychology?

10:19:50 10 A I have not.

10:19:52 11 Q So would you not claim to have any
10:19:54 12 expertise in the area of psychology?

10:19:56 13 A I have no expertise in the area of
10:19:58 14 psychology.

10:20:00 15 Q Let's talk about advertising. Do you have
10:20:04 16 any expertise in the area of advertising?

10:20:06 17 A I have no expertise with respect to formal
10:20:10 18 training in advertising.

10:20:14 19 Q And you understand that there are formal
10:20:20 20 disciplines studying the effect of advertising and
10:20:22 21 advertising images on consumers, correct?

10:20:22 22 A Yes, sir.

10:20:24 23 Q But you do not possess that discipline
10:20:24 24 yourself?

10:20:28 25 A I do not, that is correct.

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DiBacco

10:20:32 2 Q I have noticed in your expert report which
10:20:42 3 we are copying at the moment, that you indicate that
10:20:44 4 you will give testimony. Your testimony will
10:20:46 5 include comments upon polls, is that correct?

10:20:52 6 A In terms of polls, P O L L S.

10:20:52 7 Q P O L L S.

10:20:54 8 A That is correct, sir.

10:20:58 9 Q and could you tell me which polls and what
10:21:00 10 the basic subject matter of your testimony will be?

10:21:04 11 A I have referenced some of those polls in
10:21:08 12 terms of my expert report. I mention, for example,
:21:14 13 the poll that was conducted on behalf of Blue
10:21:18 14 Cross/Blue Shield which was in 1968. The other
10:21:28 15 polls are Gallup polls, Roper polls, polls that are
10:21:30 16 conducted by nationally known organizations, which
10:21:32 17 have been in the news.

10:21:34 18 Q Can you tell me approximately how many
10:21:34 19 polls you have reviewed?

10:21:38 20 A Well, I have looked at polls, there is a
10:21:42 21 collection of Roper -- excuse me, Gallup polls since
10:21:46 22 1935 and I have confined my looking at these polls
10:21:50 23 in the period since World War II.

10:21:54 24 I cannot specify at this moment the actual
10:21:58 25 number, but they are referenced on that production

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DiBacco

10:21:58 2 list.

10:22:00 3 Q Okay. I probably should have asked you
10:22:02 4 that way. Every poll that you have reviewed is
10:22:04 5 referenced on your list?

10:22:06 6 A Those that I relied upon, that is correct,
10:22:08 7 sir.

10:22:08 8 Q Were there others that you reviewed that
10:22:08 9 you did not rely upon?

10:22:10 10 A To the best of my knowledge, no.

10:22:16 11 Q And what are your conclusions based on
10:22:18 12 your review of those polls?

10:22:22 13 A My conclusions based upon the review of
10:22:26 14 these nationally, national organization polls,
10:22:30 15 Roper, Gallup and the like, is that the risk of
10:22:34 16 smoking for the last 50 years have been well
10:22:40 17 publicized and are and have become common knowledge
10:22:42 18 with respect to the American people.

10:22:50 19 Q Let me digress for a second.

10:22:54 20 Have you had any training in the study of
10:22:56 21 the methodology of conducting polls?

10:22:58 22 A No, I have not, sir.

10:23:04 23 Q Have you had any training in the study of
10:23:06 24 interpreting the results of polls?

10:23:08 25 A I have not had formal study with respect

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DiBacco

10:23:12 2 to interpreting the results of polls.

10:23:16 3 Q Have you ever written a peer-reviewed
10:23:18 4 article on the subject of the interpretation and
10:23:20 5 results of polls?

10:23:26 6 A No, sir. I have used, however, in my
10:23:28 7 peer-review articles results of polls. And those
10:23:28 8 peer-review articles were published in various
10:23:30 9 scholarly publications.

10:23:32 10 Q But again, you recognize that there is a
10:23:36 11 discipline that people study for years or for a
10:23:40 12 lifetime concerning the methodology of conducting
10:23:44 13 polls and concerning the proper interpretation of
10:23:46 14 polls?

10:23:48 15 A Yes, and I have been exposed to those as a
10:23:54 16 historian by virtue of the fact that many polls over
10:23:56 17 the course of political history have been wrong and
10:23:58 18 I think my sensitivity to that was raised by virtue
10:24:04 19 of the Literary Digest poll which predicted in 1936
10:24:08 20 that Alf Langdon would beat Franklin Roosevelt, and
10:24:12 21 that created, of course, a very big issue,
10:24:16 22 additionally the 1948 election in which Tom Dewey
10:24:16 23 was projected to win over Harry Truman.

10:24:20 24 So I am sensitive to the refinements that
10:24:24 25 have been made with respect to polling as a science.

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DiBacco

10:24:26 2 Q My question was a little different. You
10:24:30 3 do understand that there is a discipline where
10:24:36 4 people spend a lifetime in both, in learning and
10:24:38 5 teaching and in writing on the subject of the proper
10:24:42 6 methodology of conducting polls and the proper
10:24:44 7 manner of interpreting polls?

10:24:44 8 A Yes, and I know that science has
10:24:48 9 progressed particularly in the last 20 years.

10:24:50 10 Q And you are not a person who claims to
10:24:52 11 have the expertise in that field that people who
10:24:56 12 have done that study and have written on the subject
:24:58 13 and have taught on the subject, is that correct?

10:24:58 14 A That is correct.

10:25:08 15 Q Could you explain the work that you did in
10:25:12 16 preparation for your testimony in this case? I am
10:25:14 17 not talking about the deposition today but your work
10:25:18 18 in preparation for your testimony at trial.

10:25:20 19 A I have, as I indicated in my expert
10:25:26 20 report, examined sources of information in the
10:25:30 21 course of the period largely since 1950 that were
10:25:34 22 available widely to the public. Those sources were
10:25:40 23 I believe iterated on page 2 of my expert report.

10:25:44 24 And I looked at newspapers which were
10:25:50 25 national as well as state, statewide newspapers. I

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DiBacco

10:25:50 2 looked at magazines.

10:25:52 3 I looked at pamphlets produced by

10:25:58 4 educational institutions and health organizations

10:26:02 5 such as the American Cancer Society, the National

10:26:06 6 Tuberculosis and Respiratory Diseases Association.

10:26:10 7 I looked at as well at television, radio,

10:26:20 8 films, I looked at the popular culture as revealed

10:26:24 9 in terms of adages and sayings.

10:26:30 10 I looked at textbooks, which states

10:26:32 11 mandated to be used in terms of the instruction of

10:26:36 12 children regarding the health risk of tobacco in

10:26:38 13 general and cigarettes.

10:26:44 14 I looked at laws that states passed

10:26:48 15 relating to the sale, distribution and education

10:26:48 16 about cigarettes.

10:26:54 17 I looked at religious tracts and documents

10:26:58 18 of the major religions relative to their views in

10:27:04 19 terms of their views with respect to cigarette usage

10:27:06 20 and the health risks therefrom.

10:27:10 21 These are some of the specific areas that

10:27:12 22 I looked at.

10:27:16 23 Q Now, I know from reading your testimony in

10:27:20 24 the Engle case that there you actually referred to a

10:27:24 25 very large number of newspaper articles and magazine

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DiBacco

10:27:26 2 articles and the like.

10:27:28 3 Is it your intention to do the same thing
10:27:30 4 in this case?

10:27:32 5 MR. ALLINDER: Objection.

10:27:34 6 THE WITNESS: I have produced for you, I
10:27:36 7 think, 300 and some pages. Newspaper articles
10:27:38 8 are listed with regard to what I have relied
10:27:40 9 upon for my expert report. As to the means by
10:27:42 10 which these will be presented in case, I don't
10:27:44 11 know.

12 BY MR. FITZPATRICK:

10:27:52 13 Q It is up to the lawyers, I guess.

10:27:54 14 A No, I didn't say that. I have -- we
10:27:56 15 haven't come to that road.

10:27:58 16 Q Okay.

10:27:59 17 A And once we come to that road, then I will
10:28:01 18 be able to make some sort of statement. But at this
10:28:03 19 point I do not know that.

10:28:05 20 Q Okay. You said you looked at TV, radio
10:28:07 21 and films. How did you go about doing that?

10:28:09 22 A Well, there is a wide collection of films
10:28:11 23 produced by various entities. I went to the
10:28:13 24 American Cancer Society and found films that they
10:28:15 25 had used. These were referenced in the newspaper

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DiBacco

10:28:34 2 articles that I reviewed. And so I did want to see
10:28:36 3 those films.

10:28:38 4 I saw other references to films in the
10:28:42 5 newspaper articles such as the See It Now series by
10:28:46 6 Edward R. Murrow in 1959.

10:28:54 7 I also consulted with a film historian who
10:29:02 8 had knowledge with respect to films and particular
10:29:04 9 public service announcements which were made.

10:29:06 10 Q I am sorry to interrupt. Could you tell
10:29:06 11 me who that was?

10:29:08 12 A Yes, Dr. Greg Black at the University of
10:29:10 13 Missouri, Kansas City.

10:29:22 14 I went to the certain repositories where I
10:29:24 15 found films were available such as the National
10:29:28 16 Library of Medicine in Bethesda, Maryland or
10:29:32 17 Rockville, Maryland. These were the ways in which
10:29:36 18 these films were looked at.

10:29:42 19 Q Did you -- let's take, go off for a
10:29:44 20 minute. I got a copy of your expert report?

10:29:46 21 MR. FITZPATRICK: So I will ask the court
10:29:50 22 reporter to mark as DiBacco Exhibit 1 a copy of
10:30:00 23 Dr. DiBacco's report dated January 13, 2000.

10:30:04 24 (DiBacco Exhibit 1 was marked for
10:30:42 25 identification.)

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2 BY MR. FITZPATRICK:

10:30:46 3 Q In reviewing -- how did you review radio?

10:30:50 4 A The public broadcasting system has
10:30:54 5 transcripts with respect to programs and they are
10:30:58 6 publicly available.

10:31:00 7 Q Is it fair to say that your ability to
10:31:04 8 review TV, films and radio, given the nature of the
10:31:08 9 median - medium, is far less than your ability to
10:31:12 10 review archival materials, newspapers, magazines and
10:31:16 11 the like?

10:31:18 12 A It is difficult to say far less. There
10:31:22 13 has been a rather significant attempt on the part of
10:31:26 14 archives for the news media, the broadcast media, to
10:31:30 15 revive those. The Vanderbilt archives are testimony
10:31:34 16 to that. I found the Wolfson Center in Miami which
10:31:38 17 is working on that.

10:31:42 18 So there are growing numbers of archival
10:31:46 19 institutions which are attempting to restore these,
10:31:50 20 but I would say it is less at the moment. But
10:31:54 21 because by the 1960s television was taking such an
10:32:00 22 enormous role in American lives, attempts are being
10:32:04 23 made to restore and to create repositories for this.

10:32:12 24 Q Let me see if I understand this
10:32:16 25 correctly. What you did was you looked at what you

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10:32:20 2 were able to ascertain were TVs or films or
10:32:24 3 transcripts of radio broadcasts that had to do with
10:32:24 4 smoking and health?

10:32:26 5 A That's correct.

10:32:30 6 Q Did you undertake a review of popular TV
10:32:34 7 shows or films or radio broadcasts?

10:32:36 8 A Yes, I did.

10:32:40 9 Q Did you review those with an eye to
10:32:44 10 ascertaining the role to which smoking played in
10:32:52 11 films or on TV?

10:32:54 12 A I reviewed them in terms of the health
10:32:56 13 risk of smoking which they disseminated to the
10:32:58 14 viewer.

10:33:06 15 Q Okay. Over the years there have been many
10:33:12 16 films, for example, films starring Humphrey Bogart
10:33:16 17 in which there was a great deal of use of smoking
10:33:18 18 cigarettes and the like, fair enough?

10:33:20 19 A There have been films in which cigarettes
10:33:22 20 have been smoked.

10:33:24 21 Q And smoking in a glamorized fashion, would
10:33:26 22 you agree with that?

10:33:30 23 MR. ALLINDER: I object to the form.

10:33:32 24 THE WITNESS: I wouldn't characterize in a
10:33:36 25 monolithic way that smoking has been

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DiBacco

10:33:38 2 characterized in that fashion.

10:33:40 3 I preface my remarks with what we began
10:33:42 4 with earlier today and that is I am not a
10:33:44 5 specialist in psychology. I am not an expert
10:33:46 6 in terms of this field or in the manner of
10:33:48 7 advertising or what something may do to
10:33:50 8 individuals with respect to how they act.

10:34:00 9 But having looked at films for years and
10:34:02 10 having reviewed them in my research, there is
10:34:04 11 no doubt that smoking is a part of those
10:34:06 12 films. My focus was to look at the extent to
10:34:08 13 which those films disseminated to the
10:34:10 14 individual the health risk of smoking.

15 BY MR. FITZPATRICK:

10:34:22 16 Q Putting aside specific references to the
10:34:24 17 health risks then, I think what you are saying is
10:34:26 18 that the extent to which non-verbal cues such as
10:34:28 19 smoking by Lauren Bacall, was not part of your
10:34:30 20 analysis?

10:34:32 21 A That's correct.

10:34:40 22 MR. ALLINDER: Objection.

23 BY MR. FITZPATRICK:

10:34:48 24 Q And the, is it fair to say that the same
10:34:50 25 is true of advertising employing pictures but not

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10:34:56 2 words?

10:34:58 3 MR. ALLINDER: Objection.

10:35:00 4 MR. BAILEY: Objection.

10:35:00 5 THE WITNESS: I don't know what that

10:35:00 6 means, advertising.

BY MR. FITZPATRICK:

10:35:02 8 Q Fair enough.

10:35:04 9 A Advertising where? I don't know what that

10:35:04 10 means.

10:35:08 11 Q Okay. You have seen many cigarette

10:35:12 12 advertisements that do not claim, they don't say

10:35:16 13 anything about health or smoking other than the

10:35:22 14 mandated warnings, is that right?

10:35:22 15 MR. ALLINDER: You are talking about,

10:35:24 16 excuse me, you are talking about text now?

10:35:26 17 MR. FITZPATRICK: Yes.

18 BY MR. FITZPATRICK:

10:35:30 19 Q You see, you are aware of advertising by

10:35:36 20 the cigarette companies that, it is really pictorial

10:35:38 21 advertising, contains no text for the most part,

10:35:44 22 other than the mandated warning, that is fair to

10:35:44 23 say?

10:35:48 24 A As of March 30, 1972, yes, sir.

10:35:48 25 Q Yes, sir.

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10:35:50 2 And my question is, in looking at those
10:35:56 3 ads have you tried to reach a conclusion as to
10:36:00 4 whether the picture in the ad, the particular
10:36:04 5 depictions carried in the ad, contain an implicit or
10:36:10 6 non-verbal message to the effect that cigarette
10:36:16 7 smoking is a healthy endeavor.

10:36:16 8 A Well, as I indicated to you earlier, I am
10:36:18 9 not an expert in that field. And you are asking me
10:36:24 10 to do that and I have not done that for --

10:36:24 11 Q No, I am not asking you to do that, I just
10:36:26 12 want to know if you did.

10:36:28 13 A No, I have not. I am not an expert in
10:36:44 14 that field.

10:36:44 15 Q Let me then, we have marked your report as
10:36:50 16 Exhibit 1. Could you take a look at that for a
10:36:56 17 moment.

10:36:56 18 A I have it.

10:37:10 19 Q I want to refer you to page 8.

10:37:12 20 A Yes, sir.

10:37:16 21 Q I am sorry, I think I meant page 10, the
10:37:24 22 second to last paragraph on the page. I call your
10:37:26 23 attention to the statement, quote, "As with other
10:37:30 24 Americans, Blue Cross and Blue Shield subscribers
10:37:34 25 across the nation were not only aware of the health

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DiBacco

10:37:36 2 risks of smoking as illustrated by the above cited
10:37:40 3 history, but were even more exposed to such risks
10:37:42 4 through publications ranging from newsletters to
10:37:46 5 pamphlets specifically written and printed for their
10:37:50 6 use by Blue Cross and Blue Shield administrations."
10:37:50 7 Do you see that?

10:37:52 8 A I see that, yes, sir.

10:37:56 9 Q Is it your present intention to testify at
10:38:00 10 trial as to what Blue Cross subscribers were aware
10:38:00 11 of?

10:38:06 12 A My intention is to testify that in
10:38:10 13 addition to having been exposed to what all other
10:38:12 14 Americans were exposed to, Blue Cross and Blue
10:38:18 15 Shield disseminated additional information. So my
10:38:24 16 frame of reference is with the general public they
10:38:28 17 were exposed to magazines and newspapers and films,
10:38:32 18 if they were a Blue Cross/Blue Shield subscriber
10:38:36 19 they had one additional means of receiving
10:38:40 20 information. That is the reference that I am making
10:38:40 21 there.

10:38:44 22 Q Okay, but I am sort of driving at a
10:38:44 23 slightly different point.

10:38:50 24 My question is are you going to testify
10:38:54 25 about what Blue Shield subscribers were aware of or

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10:38:56 2 are you going to testify about what they were
10:38:56 3 exposed to?

10:39:00 4 A I am going to testify to the exposure
10:39:06 5 which these individual subscribers were given with
10:39:08 6 regard to these publications.

10:39:14 7 Q Okay. So to that extent the statement in
10:39:18 8 your report or at least to the extent it meant to
10:39:20 9 indicate what you would testify to at trial is
10:39:22 10 mistaken in its indication that you would testify as
10:39:26 11 to what Blue Shield subscribers were aware of?

10:39:28 12 A Well, no.

10:39:28 13 MR. ALLINDER: I object to the form.

10:39:30 14 THE WITNESS: I don't think that's quite
10:39:32 15 the case. At this time when I wrote this
10:39:36 16 report, sir, on January 13, 2000, I did not
10:39:42 17 know and I wanted to use sufficiently broad
10:39:44 18 statement in order to incorporate what might be
10:39:48 19 forthcoming with regard to this discovery
10:39:48 20 phase.

10:39:52 21 I did not know that there would be Blue
10:39:54 22 Cross/Blue Shield subscribers who would be
10:39:58 23 deposed. Therefore, I understand that there
10:40:02 24 will be more than a hundred such depositions
10:40:06 25 which I hope I am able to look at. I have

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10:40:08 2 looked at some.

10:40:12 3 So that may provide me with information to
10:40:16 4 talk about the awareness end of it. But at
10:40:18 5 this point my statement there would indicate
10:40:24 6 the exposure that these documents illustrate.
10:40:28 7 What comes from the deponents who are Blue
10:40:30 8 Cross/Blue Shield subscribers may assist me in
10:40:36 9 terms of dealing with the issue of awareness.

10 BY MR. FITZPATRICK:

10:40:40 11 Q Do you have -- how many depositions have
10:40:40 12 you read in your life?

10:40:42 13 A How many depositions?

10:40:44 14 Q Depositions, yes.

10:40:44 15 MR. ALLINDER: On any subject?

10:40:46 16 MR. FITZPATRICK: On any subject, any
10:40:52 17 case.

10:40:54 18 THE WITNESS: It would be hard to quantity
10:41:04 19 that. I probably have read more in this case
10:41:10 20 thus far than I have in the Engle case.

10:41:14 21 I have read the depositions of Blue
10:41:16 22 Cross/Blue Shield administrators, I have read
10:41:22 23 several of the depositions of the Blue
10:41:26 24 Cross/Blue Shield subscribers. I can't give
10:41:28 25 you a figure but I would suggest it would

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10:41:30 2 probably be a few dozen.

3 BY MR. FITZPATRICK:

10:41:32 4 Q Prior to your -- strike that.

10:41:38 5 When were you first engaged to work as a
10:41:44 6 consultant or expert on behalf of the tobacco
10:41:44 7 industry?

10:41:46 8 A In terms of --

10:41:48 9 Q In any case.

10:41:50 10 A In any case, in October of 1995.

10:41:54 11 Q Prior to that time had you ever read a
10:41:56 12 deposition?

10:41:58 13 A Yes, I had.

10:42:00 14 Q Can you tell me how many and the
10:42:00 15 circumstances?

10:42:06 16 A I had read two or three depositions by
10:42:10 17 virtue of holding the position of dean for faculty
10:42:14 18 affairs at American University which was a contract
10:42:18 19 officer for the university. And there were a couple
10:42:24 20 of suits against the university, and in that, those
10:42:26 21 particular instances I did read depositions and I
10:42:30 22 did provide a deposition or two in that instance.

10:42:32 23 Q Is it fair to say that you read those
10:42:36 24 because you wanted to find out what the people said
10:42:38 25 during the depositions, not for the purpose of

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10:42:40 2 rendering an expert opinion?

10:42:48 3 A It was so long ago I really can't put my
10:42:52 4 finger on why I read those depositions.

10:42:54 5 Q It is fair to say, without why you read
10:42:56 6 them, it wasn't for the purpose of rendering an
10:42:58 7 expert opinion?

10:43:02 8 A I don't know at the time what it was for.
10:43:04 9 I think it was for the purpose of preparing me for
10:43:06 10 my own deposition.

10:43:14 11 Q So before you were retained by the tobacco
10:43:22 12 companies you had not read depositions with a view
10:43:26 13 toward expressing an expert opinion as to what those
10:43:30 14 depositions revealed about the deponents' state of
10:43:32 15 knowledge?

10:43:32 16 MR. ALLINDER: Objection.

10:43:32 17 THE WITNESS: I can't answer that
10:43:36 18 question. It has been so long ago and those
10:43:40 19 cases are fuzzy in my mind. I can tell you
10:43:44 20 more about my testimony as opposed to the
10:43:46 21 depositions.

22 BY MR. FITZPATRICK:

10:43:56 23 Q Let me ask it this way: Did you -- you
10:44:00 24 have testified in two tobacco and health related
10:44:00 25 cases, is that correct?

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10:44:06 2 A I have testified in, in terms of
10:44:10 3 depositions, in terms of trial testimony, is that
10:44:14 4 what we are talking about?

10:44:12 5 Q Let me go, just talking about trial. Let
10:44:14 6 me rephrase it.

10:44:16 7 You have testified at the Engle trial, is
10:44:18 8 that correct?

10:44:18 9 A That is correct.

10:44:20 10 Q And at the Broin trial?

10:44:22 11 A I only testified in the Engle trial. I
10:44:24 12 was ~~deposed~~ in the Broin trial.

10:44:26 13 Q So you testified at trial once?

10:44:28 14 A That is correct.

10:44:30 15 Q This --

10:44:32 16 MR. ALLINDER: And we are talking about
10:44:34 17 tobacco cases at this point in time?

10:44:36 18 MR. FITZPATRICK: Yes, I am talking about
10:44:38 19 tobacco cases.

10:44:40 20 MR. ALLINDER: All right.

21 BY MR. FITZPATRICK:

10:44:40 22 Q Have you testified in other cases,
10:44:42 23 non-tobacco cases?

10:44:44 24 A No, sir, other than the two that I
10:44:46 25 referenced in terms of the faculty affairs

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10:44:48 2 position.

10:44:56 3 Q Okay. So with the -- other than the
10:44:58 4 degree to which you may have done so in Engle, and I
10:45:00 5 don't want to characterize whether you did or
10:45:06 6 didn't, you have not otherwise testified as an
10:45:14 7 expert interpreting depositions and the extent to
10:45:16 8 which the testimony reveals the state of mind of the
10:45:18 9 deponent is that correct?

10:45:20 10 A When I testified --

10:45:20 11 MR. ALLINDER: I object to the form.

10:45:22 12 Go ahead.

10:45:22 13 THE WITNESS: When I testified in the
10:45:26 14 Engle case I asked to see the depositions of
10:45:30 15 members of the family --

10:45:32 16 BY MR. FITZPATRICK:

10:45:32 17 Q Excuse me, I am sorry to interrupt you,
10:45:36 18 but I am excluding Engle for the moment.

10:45:36 19 A I am sorry.

10:45:38 20 Q Okay. Prior to Engle --

10:45:38 21 A Right.

10:45:42 22 Q Or other than Engle, have you ever given
10:45:48 23 expert testimony about the content of a deposition?

10:45:50 24 MR. ALLINDER: I object to the form.

10:45:54 25 THE WITNESS: Again, I can't recall with

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10:46:00 2 regard to my faculty affairs position the
10:46:04 3 depositions and their relation to my testimony.

4 BY MR. FITZPATRICK:

10:46:16 5 Q Okay. You mentioned earlier the
10:46:22 6 television was a popular force by the 1960s, is that
7 right?

10:46:22 8 A Yes, sir.

10:46:26 9 Q In fact, it was a popular force in the
10:46:28 10 1950s as well, wasn't it?

10:46:28 11 A That's correct.

10:46:30 12 Q And remains perhaps the most popular force
10:46:32 13 in our culture today?

10:46:32 14 A It is one of them.

10:46:42 15 Q And in the fifties and sixties there was
10:46:48 16 a, there was advertising about cigarettes on
10:46:50 17 television, wasn't there?

10:46:52 18 A Excuse me, I didn't hear.

10:46:54 19 Q There was cigarette advertisements on TV
10:46:56 20 in the fifties and sixties?

10:46:56 21 A There was.

10:46:58 22 Q Have you reviewed any of those?

10:47:04 23 A I have seen them by virtue of my having
10:47:08 24 gone through newspapers and magazines, television
10:47:10 25 and the like, yes.

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10:47:12 2 Q Without regard to your expertise or lack
10:47:16 3 thereof as to advertising, you would agree as a
10:47:18 4 matter of common sense, would you not, that the
10:47:22 5 advertising of cigarettes in the medium of TV in the
10:47:26 6 fifties and sixties had a powerful impact on the
10:47:28 7 population as a whole?

10:47:28 8 MR. ALLINDER: Objection.

10:47:30 9 THE WITNESS: Well, again, you are asking
10:47:32 10 me to assume the role of an advertising expert
10:47:36 11 and I can't do that.

12 BY MR. FITZPATRICK:

10:47:38 13 Q I am asking more in your role as, you
10:47:42 14 would consider your expertise, would you not,
10:47:46 15 American history and particularly popular culture as
10:47:48 16 part of American history, fair enough?

10:47:48 17 A Yes.

10:47:52 18 Q So I am asking you in that role, I don't
10:47:54 19 want you to give me an expert opinion as to whether
10:47:58 20 people believe the ads or didn't believe the ads,
10:48:00 21 but TV was a powerful medium, you believe that?

10:48:02 22 A It was.

10:48:06 23 Q Yes. And it did contain a large number of
10:48:10 24 advertisements for cigarettes in the fifties and
10:48:10 25 sixties?

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10:48:12 2 A It did.

10:48:14 3 Q And those advertisements to the best of
10:48:16 4 your knowledge never contained, did they, a warning
10:48:20 5 that cigarettes were harmful to people's health?

10:48:22 6 A To the best of my knowledge, they did
10:48:26 7 provide common sense warnings about health risks.

10:48:32 8 Q The advertisements by the tobacco
10:48:34 9 companies.

10:48:34 10 A Yes.

10:48:36 11 Q -- in the 1950s?

10:48:38 12 A Yes.

10:48:38 13 Q Can you give me an example?

10:48:42 14 A The Old Golds, not a cough in a carload
10:48:44 15 which suggested by implication that there were
10:48:46 16 coughs in other brands.

10:48:48 17 Q Okay, I see. It also suggested by
10:48:52 18 implication that that particular cigarette was free
10:48:54 19 from those problems health problems, right?

10:48:56 20 A That is correct.

10:49:00 21 Q And there also were TV programs, you
10:49:04 22 mentioned Edward R. Murrow before, where there was a
10:49:06 23 great deal of smoking by the participants in those
10:49:08 24 TV programs, is that right?

10:49:16 25 A Mr. Murrow smoked, there is no doubt that

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10:49:24 2 he smoked. I looked at the See It Now two-part
10:49:28 3 series which dealt with tobacco in 1955 and he
10:49:30 4 didn't smoke on that program because he was only
10:49:34 5 there for the beginning, the middle and the end and
10:49:36 6 was largely done by somebody else.

10:49:40 7 But there is little doubt that Mr. Murrow
10:49:40 8 smoked.

10:49:44 9 Q And Arthur Godfrey smoked on TV?

10:49:46 10 A He did smoke. I didn't watch Mr. Godfrey
10:49:50 11 on TV because he was primarily a radio personality
10:49:52 12 at the time.

10:49:56 13 Q But he did smoke, I watched him on TV and
10:49:58 14 he smoked, you would agree with that?

10:49:58 15 A He did smoke.

10:50:10 16 Q Would you agree with me that TV has its
10:50:14 17 most powerful impact on children and teenagers?

10:50:14 18 MR. ALLINDER: I object to the form.

10:50:18 19 THE WITNESS: Again, you are asking me to
10:50:20 20 assume the role that I indicated I could not.

10:50:24 21 I am not an advertising specialist.

22 BY MR. FITZPATRICK:

10:50:26 23 Q I am purposely staying away from
10:50:28 24 advertising, I am just asking about the medium. And
10:50:32 25 I think you have written on the subject that TV was

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10:50:34 2 a very powerful influence on the culture, is that
10:50:34 3 correct?

10:50:36 4 A Can you be specific?

10:50:38 5 Q I believe it is in your history book that
10:50:42 6 you have written that TV was very powerful. And I
10:50:46 7 don't have it here but I hope that refreshes your
10:50:48 8 recollection you have written on the subject that TV
10:50:50 9 has a very powerful influence on the culture,
10:50:52 10 correct?

10:50:52 11 A It was very powerful. As to its
10:50:56 12 relationship to advertising or inducing people to do
10:51:00 13 things, I don't think I wrote on that.

10:51:02 14 Q And I am not asking that. I am just
10:51:06 15 simply asking you whether it, TV, has a
10:51:12 16 disproportionately high influence on children and
10:51:12 17 teenagers?

10:51:17 18 MR. ALLINDER: I object to the form.

10:51:18 19 THE WITNESS: Again, you are asking me a
10:51:22 20 very general question. I do not have the
10:51:24 21 expertise to deal with that.

10:51:28 22 If you could be more specific and relate
10:51:30 23 to a field that is within my area of expertise,
10:51:36 24 I might be able to do that, but as a broad
10:51:40 25 statement, that is beyond my expertise.

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2 BY MR. FITZPATRICK:

10:51:44 3 Q Okay. I take it that you would not be in
10:51:48 4 a position to dispute the opinion of someone whose
10:51:52 5 field is that expertise that --

10:51:52 6 MR. ALLINDER: Objection.

10:51:56 7 Q -- TV has a very significant impact on
10:51:58 8 children and teenagers?

10:52:00 9 MR. ALLINDER: I object to the form.

10:52:02 10 THE WITNESS: I would not certainly be
10:52:06 11 able to render a comment on that until I knew
10:52:24 12 what it was.

13 BY MR. FITZPATRICK:

10:52:32 14 Q I will refer again to page 10 and
10:52:34 15 referring also to your testimony earlier about the
10:52:40 16 quote that I read you, your testimony is going to be
10:52:42 17 that Blue Cross and Blue Shield subscribers were
10:52:44 18 exposed to information about the health risks of
10:52:46 19 smoking, is that a fair way to characterize what
10:52:50 20 your present intention is to testify at trial?

10:52:52 21 A They were exposed through publications,
10:52:52 22 yes, that's correct.

10:52:56 23 Q Can you tell me what specifically the
10:53:02 24 health risks that they were exposed to?

10:53:04 25 A I indicated that earlier with regard to my

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10:53:10 2 expert report there were several I think key
10:53:16 3 milestones with regard to Blue Cross/Blue Shield in
10:53:26 4 terms of --

10:53:18 5 Q I am sorry, I think perhaps you
10:53:20 6 misunderstand my question. I am asking about the
10:53:22 7 particular health risks.

10:53:24 8 A I understand.

10:53:24 9 Q What diseases, for example.

10:53:26 10 A Good, okay.

10:53:26 11 MR. ALLINDER: And you are still asking
10:53:28 12 about Blue Cross/Blue Shield subscribers in
10:53:32 13 terms of special information that they may have
10:53:32 14 received from the plan?

10:53:34 15 MR. FITZPATRICK: Well, no, let me
10:53:34 16 rephrase that.

10:53:36 17 MR. ALLINDER: Okay.

18 BY MR. FITZPATRICK:

10:53:42 19 Q Your opinion is that Blue Cross had,
10:53:46 20 subscribers had some more exposure than the
10:53:46 21 Americans in general?

10:53:48 22 A They had one additional layer, that is
10:53:50 23 correct.

10:53:56 24 Q My question is meant to be more general
10:53:56 25 than that.

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10:54:00 2 Your opinion is that Americans in general
10:54:06 3 were exposed to the health risks of smoking,
10:54:06 4 correct?

10:54:06 5 A That's correct.

10:54:10 6 Q I mean, exposed to it, by that I mean that
10:54:14 7 in writings that you reviewed there was discussion
10:54:16 8 of the health risks involved, correct?

10:54:16 9 A That's correct.

10:54:20 10 Q What I am asking you now is what health
10:54:22 11 risks are you referring to specifically.

10:54:24 12 A Well, the health risks to which I am
10:54:28 13 referring are those that are also being referenced
10:54:34 14 in terms of the other media, the health risk with
10:54:40 15 respect to lung cancer, heart disease, emphysema,
10:54:44 16 the matters of smoking and pregnancy.

10:54:46 17 The difference with respect to Blue
10:54:48 18 Cross/Blue Shield was --

10:54:50 19 Q I am sorry, I didn't -- that is not my
10:54:52 20 question. If your counsel wishes to ask you a
10:54:56 21 question about that later, he can.

10:55:00 22 Are there any other than those?

10:55:00 23 MR. ALLINDER: I am sorry, can you ask
10:55:04 24 your question again, because I am lost too.

10:55:04 25 MR. FITZPATRICK: I am asking him what

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10:55:10 2 diseases he believes the American public was,
10:55:12 3 information about which they were exposed to
10:55:16 4 through the periodicals and other materials
10:55:20 5 that he has reviewed.

10:55:20 6 MR. ALLINDER: Okay.

10:55:22 7 THE WITNESS: So we are talking only about
10:55:22 8 the --

9 BY MR. FITZPATRICK:

10:55:26 10 Q I will ask you if Blue Cross knew more, I
10:55:26 11 will ask you that next.

10:55:28 12 A Okay, I am sorry.

10:55:28 13 Q But my question now is what are the
10:55:34 14 diseases that you believe were written about to such
10:55:36 15 an extent that the American people in general were
10:55:40 16 exposed to knowledge of those risks, which specific
10:55:44 17 diseases. You have told me lung cancer, emphysema.

10:55:44 18 A Heart disease.

10:55:48 19 Q Heart disease and pregnancy issues.

10:55:48 20 A Right.

10:55:48 21 Q Are there any others?

10:55:52 22 A Yes, cancer of the bladder, pancreas,
10:55:56 23 neoplasms in the mouth, tumors in the mouth, larynx,
10:56:02 24 esophagus --

10:56:02 25 Q Now --

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10:56:02 2 A The --

10:56:04 3 Q I am sorry, I didn't mean to interrupt.

10:56:06 4 Go ahead.

10:56:10 5 A Complications with respect to vision and
10:56:14 6 amblyopia was referenced in terms of that,
10:56:20 7 circulatory ills such as Buerger's disease, cancer
10:56:28 8 of the pancreas.

10:56:30 9 Q Let's take pancreas, cancer of the
10:56:34 10 pancreas. Can you tell me the frequency with which
10:56:36 11 that was discussed in the materials you reviewed?

10:56:42 12 A It was a topic which was included often in
:56:46 13 doctors' advice columns of which there were many, as
10:56:48 14 you will note from my exhibit list.

10:56:52 15 My reading of the materials would suggest
10:56:58 16 that what happened in terms of the health risk is
10:57:02 17 the health risk started out with lung cancer and
10:57:08 18 heart disease and emphysema, the initial 1964 report
10:57:12 19 of the Surgeon General including many others, and
10:57:16 20 what happened as a matter of dissemination is that
10:57:22 21 those which had been mentioned to a lesser degree in
10:57:26 22 the original '64 report were amplified in subsequent
10:57:28 23 ones, and that included bladder cancer, that
10:57:34 24 included kidney cancer, cancers which were not as
10:57:38 25 directly related to the lungs.

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10:57:40 2 Q There has been, has there not, far less
10:57:44 3 dissemination of information about pancreatic
10:57:50 4 cancer, liver cancer and the other diseases that you
10:57:54 5 referred to other than heart, emphysema, lung
10:57:54 6 cancer?

10:57:56 A I think that's a fair statement.

10:58:00 8 Q And you would not claim, would you, that
10:58:06 9 the great majority of Americans have been exposed to
10:58:14 10 information concerning the risk, the fact that
10:58:18 11 pancreatic cancer is caused by cigarette smoking?

10:58:20 12 MR. ALLINDER: I object to the form.

10:58:32 13 THE WITNESS: I think that would be a very
10:58:32 14 difficult conclusion for me to agree with
10:58:32 15 because in very recent years, in the last 20
10:58:36 16 years the information has simply been through
10:58:40 17 doctors' advice columns and what I perceived in
10:58:44 18 terms of the educational literature by the ACS,
10:58:46 19 the national -- the American Lung Association
10:58:50 20 now, the American Heart Association and many
10:58:52 21 other groups is don't smoke and the reason is
10:58:54 22 because there are health risks. They don't
10:58:58 23 delineate them. But --

24 BY MR. FITZPATRICK:

10:59:00 25 Q That's really my point, isn't it, that

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10:59:02 2 there are specific diseases that you would not claim
10:59:06 3 that the public is generally aware are associated
10:59:06 4 with smoking.

10:59:08 5 A I haven't done an analysis of that with
10:59:13 6 respect to the public, I don't know.

10:59:14 7 Q It is fair to say, isn't it, that this
10:59:16 8 dissemination of information was not done by the
10:59:16 9 tobacco companies, right?

10:59:20 10 A The dissemination of information was done
10:59:22 11 by public health authorities.

10:59:26 12 Q I just asked you whether it was done by
10:59:28 13 tobacco companies.

10:59:28 14 A No, it was not.

10:59:30 15 Q And in fact the tobacco companies made
10:59:32 16 statements to the effect that smoking did not cause
10:59:34 17 cancer, correct?

10:59:36 18 MR. ALLINDER: I object to the form.

10:59:40 19 THE WITNESS: My reading of the materials
10:59:42 20 that appeared in the newspapers and the
10:59:44 21 magazines which referenced the tobacco industry
10:59:52 22 position, was that the tobacco industry argued
10:59:56 23 that there was only a statistical correlation
10:59:58 24 which had been proved, that more research
11:00:00 25 needed to be done and that there had not been

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11:00:06 2 the scientific causation of lung cancer
11:00:06 3 determined.

4 BY MR. FITZPATRICK:

11:00:08 5 Q You don't recall reading statements
11:00:12 6 that -- well, you do -- strike that.

11:00:14 7 Do you recall reading statements that, by
11:00:18 8 the tobacco industry, that it had not been
11:00:20 9 established that smoking caused lung cancer?

11:00:24 10 A I recall reading statements that there had
11:00:28 11 not been, other than a statistical correlation with
11:00:30 12 regard to the matter of lung cancer. And therefore
:00:34 13 the matter of scientific causation had not been
11:00:36 14 determined.

11:00:42 15 Q Now, you have read a great deal of
11:00:46 16 information by the Surgeon General about the health
11:00:48 17 risks?

11:00:48 18 A By the Surgeons General, yes.

11:00:52 19 Q Surgeons General. By the American Cancer
11:00:52 20 Society?

11:00:52 21 A Yes, sir.

11:00:54 22 Q By physicians?

11:01:00 23 A By individual physicians, yes.

11:01:04 24 Q Do you think that the tobacco industry was
11:01:08 25 being truthful when it stated that it had not been

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11:01:12 2 proven that lung cancer was caused by smoking?

11:01:12 3 MR. ALLINDER: I object to the form.

11:01:16 4 THE WITNESS: My position is I do not
11:01:20 5 testify to the truth or the untruth of any of
11:01:24 6 the articles that I read in the newspapers,
11:01:28 7 magazines. That has not been my function. I
11:01:32 8 am not an expert in industry conduct nor am I
11:01:36 9 an expert in terms of public health.

10 BY MR. FITZPATRICK:

11:01:36 11 Q I am asking you what you believe. You
11:01:40 12 have read a lot and I think the jury would want to
11:01:44 13 know. do you believe that the industry was being
11:01:48 14 truthful when it stated that it had not been
11:01:52 15 established that smoking causes lung cancer?

11:01:52 16 MR. ALLINDER: I object to the form. And
11:01:54 17 you are not asking for an opinion?

11:01:56 18 MR. FITZPATRICK: I just want to know what
11:01:58 19 he believes.

11:01:58 20 MR. ALLINDER: His personal belief.

11:02:00 21 THE WITNESS: First of all, I am not a
11:02:02 22 medical doctor and I am not schooled in medical
11:02:04 23 science.

11:02:08 24 I think the tobacco companies made a
11:02:12 25 technical distinction which lasts to this very

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11:02:14 2 day as I read the literature, and I am not a
11:02:18 3 physician, that scientific causation has still
11:02:22 4 not been established.

11:02:26 5 My personal belief is that that was a
11:02:34 6 technical distinction, as I see it, with regard
11:02:38 7 to the tobacco industry statement. I am not
11:02:40 8 speaking as an expert on the industry conduct
11:02:44 9 of which I am not qualified to do. But that's
11:02:46 10 how I see it personally.

11 BY MR. FITZPATRICK:

11:02:48 12 Q Do you believe that smoking causes lung
:02:52 13 cancer?

11:02:52 14 MR. ALLINDER: Excuse me, same basis as --

15 MR. FITZPATRICK: Same basis.

11:02:54 16 MR. ALLINDER: -- the prior objection.

11:02:56 17 You are asking for personal belief?

11:02:58 18 MR. FITZPATRICK: Yes, personal belief.

11:03:00 19 But I am including in, the question is in
11:03:04 20 the context that this witness is proffered as
11:03:08 21 an expert on what information has been out for
11:03:12 22 decades about the risks associated with
11:03:14 23 smoking.

11:03:18 24 MR. ALLINDER: And he is that, he is, as
11:03:22 25 is indicated in his expert report, prepared to

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11:03:24 2 offer opinions regarding the information that
11:03:24 3 was communicated publicly.

11:03:26 4 And your question, though, is asking him
11:03:30 5 to state his personal belief with respect to
11:03:32 6 the accuracy or the veracity of any of the
11:03:34 7 individual --

11:03:34 8 MR. FITZPATRICK: Well, now I am asking
11:03:38 9 him whether he believes that smoking causes
11:03:40 10 lung cancer, simple question.

11:03:42 11 MR. ALLINDER: Okay. And he has said to
11:03:44 12 you that is not part of his opinion. So you
11:03:48 13 are asking for his personal belief?

11:03:48 14 MR. FITZPATRICK: I am asking for his
11:03:50 15 personal belief, but I am not -- we don't have
11:03:52 16 to debate this here, Bill.

11:03:54 17 MR. ALLINDER: That's right.

11:03:54 18 MR. FITZPATRICK: I am asking it for
11:03:56 19 whatever purpose it may be.

20 BY MR. FITZPATRICK:

11:03:58 21 Q I would like to know what your personal
11:04:00 22 belief is, does smoking cause lung cancer?

11:04:00 23 MR. ALLINDER: I object.

11:04:02 24 And you may answer.

11:04:04 25 THE WITNESS: My personal belief is that

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11:04:08 2 it is a, one of the causative factors in terms
11:04:10 3 of lung cancer.

11:04:10 4 BY MR. FITZPATRICK:

11:04:14 5 Q Is it a cause of emphysema?

11:04:16 6 MR. ALLINDER: I am going to maintain my
11:04:18 7 same objection.

11:04:18 8 MR. FITZPATRICK: I understand.

11:04:18 9 MR. ALLINDER: Go ahead.

11:04:20 10 THE WITNESS: Personally I believe the
11:04:22 11 same thing, it is a contributory cause.

11:04:22 12 BY MR. FITZPATRICK:

11:04:28 13 Q Is it a cause of heart disease?

11:04:34 14 A Again, I would say the same thing
11:04:36 15 personally, I believe it can aggravate and bring
11:04:38 16 about heart disease.

11:04:38 17 Q And do you believe those -- are you
11:04:40 18 certain in those beliefs?

11:04:44 19 A I would not smoke. I think that's the
11:04:46 20 best indication of my certainty.

11:04:54 21 Q You did smoke for a while?

11:04:54 22 A I did smoke.

11:04:58 23 Q When and for how long and at what ages?

11:05:04 24 A I started in 1953, I was 16. I take that
11:05:08 25 back. When I was about six or seven my friend and I

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11:05:12 2 Billy used to snatch cigarettes off the ground and
11:05:14 3 choke on them, but we did not smoke.

11:05:16 4 I began --

11:05:20 5 Q You are probably the first guy that ever
11:05:26 6 did that.

11:05:28 7 A No, I am not the first guy that ever did
11:05:22 8 that.

11:05:26 9 But I started to smoke regularly when I
11:05:32 10 was 16 in 1953 and I continued to smoke until 1971
11:05:36 11 when I was 34.

11:05:38 12 Q And why did you quit?

:05:42 13 A I quit because as a teacher at the time, a
11:05:44 14 professor, I was having increasing problems with my
11:05:50 15 voice. I had an inability to speak loudly without
11:05:56 16 getting hoarse. I knew the seven warning signs of
11:06:04 17 cancer. And therefore I thought I should smoke --
11:06:08 18 stop, even though I felt otherwise in the prime of
11:06:14 19 my life.

11:06:18 20 Q So therefore you quit for health reasons?

11:06:22 21 A Well, I quit because I did not manifest,
11:06:24 22 other than the hoarseness, what I thought to be
11:06:30 23 debilitating disease at the time, but I, I thought
11:06:32 24 it would be best for me.

11:06:36 25 And I felt -- I can remember now as I

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11:06:40 2 think about why I chose '71 to do it, the senior
11:06:44 3 class in 1971 voted me the best professor of the
11:06:46 4 university and I had to give a speech at
11:06:52 5 commencement. And I was giving it along with Art
11:06:54 6 Buchwald. And I wanted to be able to attend all of
11:06:58 7 the ceremonies without smoking, and so I said I was
11:07:04 8 going to stop by then, and I did.

11:07:10 9 Q Why did you smoke for all those years --
11:07:12 10 strike that.

11:07:14 11 During the period of time that you smoked,
11:07:18 12 were you aware of the health risks associated with
:07:18 13 smoking?

11:07:20 14 A Absolutely.

11:07:20 15 Q So --

11:07:24 16 A I was required in my, the same year I
11:07:26 17 started, to know the seven warning signs of cancer.
11:07:34 18 And my biology teacher, Jack Heritage, who I can see
11:07:38 19 to this very day, was an antismoking person, who
11:07:42 20 would begin every day virtually with the statement
11:07:46 21 about how bad it was to smoke. I was very well
11:07:50 22 aware of it. But at 16 I thought I was invincible
11:07:52 23 and therefore I smoked.

11:07:56 24 Q And you continued until you were 30 --

11:07:58 25 A 4.

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11:08:00 2 Q 4, a professor, highly educated
11:08:04 3 professor. Why did you continue for that period of
11:08:04 4 time?

11:08:08 5 A I continued because I enjoyed smoking. It
11:08:10 6 was a choice, personal choice that I made. I
11:08:14 7 thoroughly enjoyed smoking.

11:08:16 8 Q Did you consider yourself addicted?

11:08:20 9 A Well, you know, I never thought about it.

11:08:24 10 We never talked in those terms in those years. I
11:08:26 11 know there were times when I was ill and I didn't
11:08:34 12 smoke. As a younger man I was exposed to influenza

11:08:38 13 and colds and I had more than my share of that, and
11:08:42 14 I would stop smoking then without any ill effects.

11:08:46 15 So it's, it's difficult to say whether I
11:08:48 16 was or wasn't the more I think about that because
11:08:54 17 that is a term you didn't think about.

11:08:58 18 Q Do you think it would have affected the
11:09:06 19 timing of when you stopped had the tobacco industry
11:09:10 20 itself come out publicly and said, smoking causes
11:09:14 21 lung cancer, smoking is addictive, smoking causes
11:09:14 22 emphysema?

11:09:16 23 A No, because the first doctor I went to
11:09:24 24 indicated that I should stop smoking. So I had
11:09:28 25 marginal high blood pressure and I was applying for

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11:09:32 2 my first job and he said, you know, you should stop
11:09:32 3 smoking.

11:09:36 4 And I said, how do you know I smoked.

11:09:36 5 He said, I know.

11:09:38 6 So I knew that. And I don't think
11:09:42 7 anything that would have been said by anybody else
11:09:44 8 would have changed my view. I knew the risks, I
11:09:48 9 knew I was taking them. And it was a personal
11:10:04 10 choice and I thoroughly enjoyed smoking.

11:10:06 11 MR. FITZPATRICK: Take a break for a

11:10:06 12 minute.

11:10:06 13 THE VIDEOGRAPHER: Going off the record.

11:26:03 14 (At 11:10 a.m. a 17 minute recess was
11:27:44 15 taken.)

11:27:56 16 THE VIDEOGRAPHER: We are on the record.

11:27:56 17 MR. ALLINDER: Thank you.

11:27:56 18 Before we begin I would like to note for
11:28:06 19 the record the conversation that

11:28:06 20 Mr. Fitzpatrick and I had during the break.

11:28:06 21 I pointed out to him that there has not
11:28:08 22 been a revision to Dr. DiBacco's expert report
11:28:10 23 and as is reflected on the first page of his
11:28:14 24 report he does have an opinion with respect to
11:28:18 25 the common knowledge of the general public of

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11:28:22 2 the information communicated about the health
11:28:24 3 risks of smoking and is expected to testify
11:28:26 4 about that awareness.

11:28:32 5 And there is a distinction as is pointed
11:28:36 6 out on page 10 of his expert report which
11:28:38 7 Mr. Fitzpatrick was examining the witness about
11:28:42 8 prior to the break concerning the difference if
11:28:46 9 any between the level of exposure or awareness
11:28:48 10 of information of the Blue Cross/Blue Shield
11:28:50 11 subscriber population versus the general
11:28:52 12 public.

11:28:54 13 MR. FITZPATRICK: All right. And so we
11:28:56 14 don't have to waste time questioning the
11:28:58 15 witness on it, it is my understanding that he
11:29:00 16 will testify as to the awareness of the general
11:29:02 17 public and the Blue Shield/Blue Cross
11:29:04 18 subscribers but will not testify that one group
11:29:06 19 is more aware than the other?

11:29:16 20 MR. ALLINDER: I believe that is the case.

11:29:18 21 THE WITNESS: That is the case.

11:29:20 22 MR. FITZPATRICK: He may testify that Blue
11:29:22 23 Cross had an additional bit of exposure than
11:29:24 24 the general public?

11:29:26 25 MR. ALLINDER: Yes, I believe that is also

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11:29:30 2 reflected on page 10 of the report.

11:29:30 3 MR. FITZPATRICK: And he's going to
11:29:32 4 testify, to the extent it is different from
11:29:34 5 that general awareness testimony, to what was
11:29:40 6 common knowledge among the public as a whole?

11:29:40 7 MR. ALLINDER: That is my expectation.
11:29:42 8 Is that correct?

11:29:42 9 THE WITNESS: That is correct.

11:29:44 10 MR. FITZPATRICK: Okay.

11 BY MR. FITZPATRICK:

11:29:48 12 Q Now let's then talk first about common
:29:48 13 knowledge.

11:29:50 14 MR. ALLINDER: Before we move on, and
11:29:54 15 let's put aside for the moment that Dr. DiBacco
11:29:56 16 has indicated that he has started to receive
11:29:58 17 and review individual subscriber depositions
11:30:02 18 and it may be that he will have opinions with
11:30:04 19 respect to them and perhaps his report will be
11:30:06 20 revised in the future, but at the present time,
11:30:10 21 no, it is as you have just stated.

11:30:10 22 MR. FITZPATRICK: Okay.

11:30:12 23 MR. ALLINDER: Fair enough?

11:30:12 24 MR. FITZPATRICK: Fair enough.

11:30:12 25 MR. ALLINDER: Okay.

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11:30:14 2 MR. FITZPATRICK: Fair enough.

3 BY MR. FITZPATRICK:

11:30:16 4 Q Let me ask you, how many depositions of
11:30:18 5 subscribers have you reviewed to date?

11:30:28 6 A Maybe 15 to 20.

11:30:30 7 Q Do you recall which ones?

11:30:34 8 A I can name some.

11:30:36 9 MR. FITZPATRICK: Maybe I could short
11:30:38 10 circuit it and you guys can give us a list.

11:30:40 11 MR. ALLINDER: Of what he has already?

11:30:40 12 MR. FITZPATRICK: Right.

11:30:42 13 MR. ALLINDER: Be happy to. I am not sure
11:30:44 14 that I can do it today.

11:30:44 15 MR. FITZPATRICK: No, and the names
11:30:46 16 wouldn't mean anything to me anyway so it is
11:30:48 17 not worth to go through it, but if you could
11:30:50 18 give us that list.

11:30:50 19 MR. ALLINDER: Be happy to.

11:30:52 20 Excuse me, and it is our intention to send
11:30:58 21 all of them to him, and at some point in time
11:31:00 22 if you want us to tell you that we have done
11:31:02 23 all of that or less than that, we can certainly
11:31:02 24 do that.

11:31:04 25 MR. FITZPATRICK: Okay.

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11:31:06 2 Let's go off the record again for a
11:31:06 3 minute.

11:31:08 4 MR. ALLINDER: I am sorry.

11:31:08 5 THE VIDEOGRAPHER: Going off the record.

11:32:54 6 (Discussion off the record.)

11:32:58 7 THE VIDEOGRAPHER: We are on the record.

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BY MR. FITZPATRICK:

11:33:04 9 Q From the depositions you have read to date
11:33:08 10 have you been able to draw any conclusions as to the
11:33:12 11 awareness of those deponents about the health risks
11:33:16 12 associated with smoking?

:33:20 13 A In terms of which kind of depositions,
11:33:20 14 subscribers?

11:33:26 15 Q Yes. Well, okay. Yes, let's talk about
11:33:26 16 subscribers now.

11:33:32 17 A I've read too few of them. I am told that
11:33:36 18 I will get a hundred plus. At this point I've only
11:33:40 19 read 15 or 20 so I have not arrived at any
11:33:42 20 conclusion, no, sir.

11:33:46 21 Q Okay. Now, you asked me if I was
11:33:48 22 referring to those depositions which implies that
11:33:50 23 there were some other depositions. Are those the
11:33:52 24 depositions of Blue Cross employees?

11:33:56 25 A Yes, administrators' employees, yes, sir.

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11:34:04 2 Q And have you -- do you intend -- and,
11:34:06 3 Bill, you can answer this too -- to offer testimony
11:34:12 4 on the awareness of Blue Cross employees about the
11:34:22 5 risks associated with smoking? You haven't decided
11:34:32 6 yet?

11:34:34 7 A I mean, are you asking --

11:34:28 8 Q It is not in the report, and I would like
11:34:30 9 to know if that is going to be part of the
11:34:32 10 testimony.

11:34:34 11 MR. ALLINDER: In the list of materials
11:34:38 12 that you have I think on the last page or the
:34:40 13 next to the last page you have a list of those
11:34:42 14 depositions that he has reviewed to date.

11:34:46 15 And we can ask, of course, Dr. DiBacco for
11:34:48 16 confirmation of this which may be necessary,
11:34:54 17 but I understand that it is his view that Blue
11:34:56 18 Cross/Blue Shield employees, administrators and
11:34:58 19 the like were exposed to the same information
11:35:04 20 as the general public. But he does not intend
11:35:08 21 to say that they had a higher level of
11:35:12 22 awareness than that of the general population.
11:35:16 23 So like the Blue Cross/Blue Shield subscribers,
11:35:20 24 he does not intend to distinguish them in any
11:35:24 25 sort of qualitative way in terms of the level

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11:35:26 2 of information that they had versus the general
11:35:26 3 public.

11:35:28 4 Does that answer your question?

11:35:30 5 MR. FITZPATRICK: Yes, that does.

11:35:32 6 MR. ALLINDER: But he will, of course, he
11:35:34 7 will talk about exposure to information and the
11:35:36 8 type of information that they had, just like he
11:35:40 9 indicated with subscribers earlier.

11:35:42 10 MR. FITZPATRICK: Okay.

11:35:46 11 MR. ALLINDER: Okay.

11:35:48 12 BY MR. FITZPATRICK:

11:35:48 13 Q Could you tell me what you mean by the
11:35:48 14 term common knowledge?

11:35:54 15 A I wish there were a better term but the
11:35:58 16 way I would define it is that it is, it has become a
11:36:02 17 part of the culture. In other words, something is
11:36:06 18 out there. It is being exposed so much, it is out
11:36:12 19 there and becomes a part of culture from scientific
11:36:16 20 literature to common sayings to movies to
11:36:22 21 educational literature, it has become a part of the
11:36:28 22 society in terms of the individual knowing about it.

11:36:32 23 And if I had a better word I guess I would
11:36:36 24 call it common awareness as opposed to knowledge
11:36:40 25 because it is really not a word that would have fit,

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11:36:48 2 I think, as well as common awareness, but it has
11:36:48 3 become, in other words, it is the second level.

11:36:52 4 People are exposed, and then it is more
11:36:54 5 than exposure, it is so much a part, it becomes part
11:36:58 6 of the culture which means that people are aware of
11:37:04 7 it, and it is widespread through the community.

11:37:08 8 Q Is it your testimony that all smokers have
11:37:16 9 been aware of the health risks from 19 -- every
11:37:22 10 person who smoked from 1953 to date has been aware
11:37:26 11 of the health risks associated with smoking?

11:37:32 12 A I would say that the exposure begins in
11:37:38 13 the period after World War II, even earlier --

11:37:40 14 Q Please, I am just asking a pretty simple
11:37:42 15 direct question. Is your testimony that everybody,
11:37:44 16 ever smoker, the millions of smokers, that every one
11:37:54 17 of them knew or knows the risks of smoking?

11:37:56 18 MR. ALLINDER: I object to the form.

11:37:58 19 THE WITNESS: You --

20 BY MR. FITZPATRICK:

11:38:02 21 Q When I say knew, some are dead, right,
11:38:02 22 that's what I am referring to.

11:38:06 23 A Yes. And I, I can't testify that every
11:38:14 24 smoker in the period since 1953 was aware of the
11:38:18 25 risk. What I can testify to is that the information

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11:38:24 2 that became available was such that it became a part
11:38:28 3 of the common culture.

11:38:30 4 Q Can you tell me when you think it became a
11:38:32 5 part of the common culture?

11:38:38 6 A It is a matter of degree in terms of
11:38:44 7 increasing the common awareness aspect.

11:38:52 8 I think it began for many individuals in
11:38:56 9 terms of the schoolbooks and the education
11:39:04 10 requirements of states. I think that polls which
11:39:08 11 are referenced in terms of my exhibit list would
11:39:12 12 suggest that by the time of the 1964 first
11:39:18 13 general -- first Surgeon General's report, that it
11:39:24 14 had become part of that common awareness, a very
11:39:26 15 large part.

11:39:26 16 Q What had become part?

11:39:30 17 A The knowledge that there are health risks
11:39:30 18 with respect to smoking.

11:39:34 19 Q Was there common knowledge that in, let's
11:39:40 20 say, let's take in the mid-1960s, that smoking
11:39:42 21 caused lung cancer?

11:39:50 22 A By 1964 there was common knowledge that
11:39:56 23 smoking caused lung cancer as illustrated by polling
11:40:00 24 data at the time. Individuals had heard of the
11:40:04 25 report, had heard of the Surgeon General's report,

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11:40:04 2 yes, sir.

11:40:06 3 Q Again, my question is when you say common
11:40:10 4 knowledge or common awareness --

11:40:10 5 A Yes.

11:40:12 6 Q -- you don't mean everybody, do you?

11:40:14 7 A There is no way to do that, no, sir.

11:40:16 8 Q In fact, it is virtually certain, is it
11:40:18 9 not, that some people didn't know?

11:40:22 10 A Again, I can't say one way or the other,
11:40:28 11 but it is a reasonable inference that you can't be
11:40:28 12 certain of everybody.

11:40:32 13 Q And that's true in the 1960s, and in the
11:40:36 14 1970s and in the 1980s and in the 1990s, isn't it?

11:40:40 15 A Well, the only caveat I would say is that
11:40:46 16 it is true as far as an individual. I think if
11:40:50 17 there were a group of individuals, it would attract
11:40:54 18 attention in terms of the media with regard to a
11:40:56 19 story about that. But I have never seen anything to
11:40:58 20 that effect.

11:41:04 21 Q Well, you would agree with me, would you
11:41:10 22 not, that it is virtually certain that large numbers
11:41:20 23 of people up until today do not fully understand the
11:41:24 24 health risks associated with smoking?

11:41:24 25 MR. ALLINDER: I object to the form.

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11:41:30 2 THE WITNESS: I don't know that I could
11:41:32 3 make that sort of statement.

11:41:36 4 What I can say is my research has
11:41:40 5 indicated that this information relative to the
11:41:44 6 health risks of smoking has become part of our
11:41:46 7 common culture.

8 BY MR. FITZPATRICK:

11:41:50 9 Q Can you make the statement that everyone
11:41:54 10 who is a smoker or potential smoker even today is
11:42:02 11 fully aware of the risks associated with smoking?

11:42:02 12 MR. ALLINDER: I object to the form.

11:42:04 13 THE WITNESS: Again, you are dealing with
11:42:08 14 individuals and I can't deal with individuals,
11:42:10 15 I can only deal with, of course, the culture.

16 BY MR. FITZPATRICK:

11:42:22 17 Q I think you said that this evolved over
11:42:26 18 time, correct?

11:42:24 19 A That's correct.

11:42:28 20 Q So that there was a certain degree of
11:42:30 21 awareness in the sixties?

11:42:30 22 A And in the fifties.

11:42:32 23 Q And would you agree there was a greater
11:42:36 24 awareness in the sixties than in the fifties?

11:42:36 25 A Yes.

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11:42:38 2 Q And a greater degree of awareness in the
11:42:40 3 seventies than in the sixties?

11:42:40 4 A That is a fair inference.

11:42:42 5 Q And a greater degree of awareness in the
11:42:44 6 eighties than the seventies?

11:42:46 7 A I think it is incremental because the
11:42:52 8 materials relative to the means by which the common
11:42:56 9 culture was being affected with regard to the
11:43:00 10 various ways in which it was being affected became
11:43:04 11 more diverse.

11:43:08 12 Q Can you tell me what expertise you believe
:43:14 13 you have to opine on what people are aware of as
11:43:16 14 opposed to what they are exposed to?

11:43:24 15 A When action takes place relative to just
11:43:32 16 the information being out there, when you see
11:43:38 17 stories with regard to individuals taking action as
11:43:42 18 a result of the material that they are being exposed
11:43:52 19 to, that is one criterion for doing it.

11:43:52 20 Q Are there others?

11:43:58 21 A I think there probably are others. That's
11:44:00 22 the first that comes to mind.

11:44:04 23 Q Have you conducted interviews of smokers
11:44:08 24 to determine their awareness or lack of awareness of
11:44:08 25 the risks associated with smoking?

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11:44:20 2 A No, I have not.

11:44:20 3 Q When you say people taking action, are you
11:44:20 4 referring to people stopping smoking?

11:44:24 5 A People writing their doctors with regard
11:44:32 6 to how to stop, asking for more information,
11:44:38 7 individuals attending classes with regard to stop
11:44:40 8 smoking.

11:44:44 9 Q Many people continue to smoke, right?

11:44:46 10 Millions of people continue to smoke, correct?

11:44:48 11 A That's correct.

11:44:50 12 Q Now, in determining the general level of
:44:54 13 awareness or common knowledge, have you taken into
11:45:00 14 account that millions of Americans continue to
11:45:00 15 smoke?

11:45:02 16 A Yes.

11:45:04 17 Q What do you conclude from it?

11:45:10 18 A I conclude that people make choices. I
11:45:16 19 also conclude that from the literature of awareness,
11:45:20 20 literature with respect to newspapers, magazines and
11:45:22 21 the like, that many individuals find it very
11:45:26 22 difficult to quit smoking. But there are
11:45:30 23 individuals as well who as a personal choice
11:45:32 24 continue to smoke.

11:45:38 25 Q Would you agree with me that people who

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11:45:46 2 are addicted to a substance are less able to fully
11:45:50 3 appreciate information concerning the harmfulness of
11:45:52 4 that substance?

11:45:52 5 MR. ALLINDER: Objection.

11:45:54 6 THE WITNESS: Well, I am not a specialist
11:46:00 7 in the field of medicine and addiction. I
11:46:02 8 can't speak in that field.

9 BY MR. FITZPATRICK:

11:46:04 10 Q You have talked about common knowledge,
11:46:04 11 right?

11:46:06 12 A Yes.

11:46:08 13 Q It is pretty common knowledge that addicts
11:46:10 14 engage in what is known as denial, isn't that true?

11:46:16 15 A Common knowledge in terms of addiction is,
11:46:22 16 I think, widespread. You are asking a question in
11:46:26 17 terms of denial which is a facet of simply more than
11:46:30 18 addiction. It is a term that might be more
11:46:32 19 appropriate for a psychologist, someone in that
11:46:36 20 field. And I hesitate to deal with those terms.

11:46:38 21 Q All right, put it this way, you certainly
11:46:42 22 are not going to testify at trial that the fact that
11:46:48 23 people are addicts has no effect on their ability to
11:46:52 24 understand or comprehend statements about the health
11:46:54 25 risks of tobacco?

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11:46:56 2 A I don't understand your question.

11:47:10 3 MR. FITZPATRICK: Would you read it back?

11:47:14 4 (Record read.)

11:47:14 5 THE WITNESS: I will not be testifying
11:47:18 6 with regard to people who are addicts, and I
11:47:20 7 think that's the purport of the question that I
11:47:20 8 see that you asked.

9 BY MR. FITZPATRICK:

11:47:22 10 Q Well, what my question is, do you believe
11:47:28 11 that you are going to -- you are going to offer an
11:47:36 12 opinion that addiction has no effect on the
11:47:40 13 awareness of the person addicted, are you going to
11:47:42 14 offer an opinion on that subject?

11:47:44 15 A I am going to offer an opinion that the
11:47:46 16 health risks of smoking, including that of
11:47:50 17 addiction, has become part of common awareness and
11:47:52 18 that would affect individuals who also allege to be
11:47:54 19 addicts.

11:47:58 20 Q Let's -- that wasn't my question.

11:48:02 21 Are you going to offer an opinion on
11:48:14 22 whether people addicted to smoking are not affected
11:48:18 23 in their awareness by that addiction?

11:48:22 24 A That is a realm of medicine, psychology,
11:48:26 25 that is beyond my expertise.

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11:48:28 2 Q Okay. In drawing your conclusions, how do
11:48:32 3 you make the distinction between people making a
11:48:38 4 choice to smoke and people who -- knowing the risks,
11:48:40 5 and people who are unaware of the risks and smoke
11:48:42 6 for that reason?

11:48:42 7 MR. ALLINDER: Object to the form.

11:48:46 8 THE WITNESS: You look at the materials
11:48:48 9 that have been published in the various places
11:48:52 10 which I have referenced on page 2, and there is
11:48:56 11 reference to individuals in both categories.

11:49:00 12 There are individuals who write letters to
:49:02 13 doctors, tell them they enjoy smoking, they
11:49:06 14 have made a decision and nothing will change,
11:49:08 15 and there are those who believe they are
11:49:08 16 addicted.

11:49:10 17 So you get a feel from reading the
11:49:16 18 materials that there are these two.

19 BY MR. FITZPATRICK:

11:49:18 20 Q I think my question may have been a little
11:49:18 21 hard to understand.

11:49:22 22 What I wanted to know is do you make a
11:49:34 23 distinction between people who smoke because -- they
11:49:36 24 smoke in the face of the risks that they know, and
11:49:40 25 people who smoke not realizing the risks, are you

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11:49:42 2 able to determine that?

11:49:46 3 MR. ALLINDER: Objection.

11:49:46 4 THE WITNESS: There is no way to determine
11:49:50 5 with respect to the individuals to which you
11:49:54 6 are pointing. I am giving a trend which I have
11:49:58 7 seen in terms of the literature which suggest
11:50:00 8 that when you read the literature over a period
11:50:04 9 of time there are individuals who choose to
11:50:06 10 smoke and there are individuals who attempt to
11:50:08 11 quit smoking.

11:50:12 12 And these are referenced in terms of the
:50:20 13 literature.

11:50:20 14 BY MR. FITZPATRICK:

11:50:22 15 Q Let's talk about this, the nature of the
11:50:32 16 general awareness. What would you say was common
11:50:36 17 knowledge about the health risks associated with
11:50:40 18 smoking in the 1950s?

11:50:46 19 A In the 1950s you have an explosion of
11:50:50 20 information with regard to scientific studies which
11:50:52 21 had been -- which were made.

11:50:54 22 Q Again, I don't mean to interrupt you but I
11:50:56 23 don't think that's responsive.

11:50:58 24 I am just asking you a pretty simple
11:50:58 25 question is, what do you think was common knowledge

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11:51:02 2 in the 1950s, what about cigarette health
11:51:06 3 consequences was common knowledge in the fifties?

11:51:08 4 MR. ALLINDER: I object to the form.

11:51:14 5 THE WITNESS: By the 1950s, cigarette
11:51:20 6 smoking can lead to a shortened life. There
11:51:24 7 are articles with regard to athletes and their
11:51:26 8 ability to perform well.

9 BY MR. FITZPATRICK:

11:51:28 10 Q Again, Doctor, I don't mean to interrupt
11:51:32 11 you, but we will move a lot more quickly if you just
11:51:34 12 answer -- Mr. Allinder is a good lawyer, he can
11:51:36 13 bring out extra information if he would like to.

11:51:40 14 I just asked the straightforward question,
11:51:44 15 not what the exposure was or how people now it, my
11:51:50 16 simple question is, what diseases caused by
11:51:52 17 cigarette smoking -- strike it. What I want to know
11:51:54 18 is what you believe the common knowledge was about
11:51:58 19 health risks associated with smoking in the 1950s.

11:52:00 20 A In the 1950s --

11:52:00 21 MR. ALLINDER: Excuse me just a second.

11:52:02 22 I don't want to quarrel with you
11:52:04 23 concerning your characterization of his prior
11:52:06 24 answer, but I think he was trying to be
11:52:08 25 responsive to you and we will let the witness

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11:52:10 2 take another shot at it.

11:52:12 3 MR. FITZPATRICK: Okay. I don't want to
11:52:14 4 quarrel about it, we did raise this ahead of
11:52:16 5 time, as you know.

11:52:16 6 MR. ALLINDER: I know that.

11:52:18 7 MR. FITZPATRICK: And I refrained from
11:52:22 8 going to the judge on assurances that we
11:52:22 9 wouldn't have this problem.

11:52:26 10 Now, when I ask what's common knowledge, I
11:52:28 11 don't think it is responsive to tell me what
11:52:30 12 some athlete did. I have a specific question
11:52:30 13 in mind.

11:52:32 14 I want to know is the -- I thought it was
11:52:36 15 clear -- I want to know what was the common
11:52:40 16 knowledge, what diseases did everybody know
11:52:44 17 were caused by cigarette smoke in the fifties.

11:52:44 18 MR. ALLINDER: I don't want to continue
11:52:48 19 this debate either. I think that the answer
11:52:52 20 that he started to give you was responsive, and
11:52:56 21 perhaps as you have restated it and maybe he
11:52:58 22 understands it better and he can get at exactly
11:53:00 23 the information that you are trying to elicit
11:53:02 24 from him.

11:53:04 25 MR. FITZPATRICK: Fine.

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11:53:06 2 THE WITNESS: May I answer?

11:53:06 3 MR. ALLINDER: Yes.

4 BY MR. FITZPATRICK:

11:53:06 5 Q Yes.

11:53:10 6 A Cigarettes will stunt your growth, common
11:53:10 7 knowledge.

11:53:12 8 Q Do they stunt your growth?

11:53:14 9 MR. ALLINDER: I object to the form.

11:53:16 10 THE WITNESS: I, I, I don't deal with the
11:53:18 11 truth or veracity, as I indicated to you

11:53:18 12 before.

:53:22 13 Cigarettes will stunt your growth.

11:53:30 14 Coffin nails, C O F F I N, nails, which

11:53:34 15 refer to a wide degree of problems, it is going

11:53:38 16 to kill you, that term was widespread by the

11:53:38 17 1950s.

11:53:44 18 Big fiend by the 1950s, which meant an

11:53:46 19 addictive nature to cigarettes.

11:53:52 20 Tobacco heart which was widely used in the

11:53:56 21 1950s to describe a whole host of maladies.

11:54:00 22 I would say by the 1950s, before the

11:54:02 23 effect of the studies that were being done in

11:54:06 24 the fifties were finished, those were common

11:54:10 25 knowledge.

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2 BY MR. FITZPATRICK:

11:54:14 3 Q What would you say was common knowledge
11:54:16 4 about the health risks of smoking in the 1960s?

11:54:22 5 A By the 1960s lung cancer, heart disease,
11:54:24 6 circulatory ills, shortened life, and the beginning
11:54:26 7 of a common knowledge with regard to smoking and
11:54:40 8 pregnancy.

11:54:42 9 Q You think this was common knowledge in the
11:54:42 10 1960s?

11:54:44 11 A It began --

11:54:44 12 MR. ALLINDER: I object to the form. This
:54:44 13 is?

11:54:44 14 MR. FITZPATRICK: What he just said. I
11:54:52 15 want to make sure that I got -- that he
11:54:54 16 understood what I was asking.

17 BY MR. FITZPATRICK:

11:54:56 18 Q Your testimony is that it was common
11:54:58 19 knowledge in the sixties that cigarette smoking
11:55:02 20 caused lung disease, is that right?

11:55:06 21 A It was common knowledge.

11:55:06 22 Q Lung cancer?

11:55:10 23 A Yes, lung cancer, heart disease, I
11:55:14 24 indicated circulatory ills and I indicated as well
11:55:18 25 the beginning of common knowledge relative to

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11:55:22 2 smoking and pregnancy.

11:55:24 3 Q This was at a time when the tobacco

11:55:26 4 industry was vigorously disputing the conclusions

11:55:30 5 reached by the Surgeon General, isn't that correct?

11:55:30 6 MR. ALLINDER: I object to the form.

11:55:32 7 THE WITNESS: This was at a time when the

11:55:38 8 tobacco industry did argue with respect to the

11:55:40 9 Surgeon General's report that more research

11:55:46 10 needed to be done, this was at that time, yes,

11:55:46 11 sir

12 BY MR. FITZPATRICK:

11:55:52 13 Q Is it your testimony that by the 1960s the

11:55:56 14 population in general was able to filter out and

11:55:58 15 decide who was right and who was wrong on this, what

11:56:02 16 the tobacco industry then called a controversy?

11:56:02 17 MR. ALLINDER: I object to the form.

11:56:04 18 THE WITNESS: My testimony is that

11:56:10 19 according to the polls at the time and the

11:56:12 20 literature at the time, which was being

11:56:14 21 disseminated, that the information that was

11:56:18 22 coming from the Surgeon General and public

11:56:20 23 health officials was drowning out the

11:56:24 24 information which was being disseminated by the

11:56:28 25 tobacco industry.

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2 BY MR. FITZPATRICK:

11:56:30 3 Q Not taking into account advertising by the
11:56:30 4 tobacco industry?

11:56:32 5 A I did consider advertising --

11:56:34 6 MR. ALLINDER: Excuse me. I object to the
11:56:34 7 form.

11:56:36 8 Go ahead.

9 BY MR. FITZPATRICK:

11:56:36 10 Q You did?

11:56:38 11 A I did look at advertising as I looked
11:56:42 12 through all of these materials.

11:56:44 13 Q Maybe I misunderstood your testimony
11:56:48 14 earlier. I thought you had not done that.

11:56:50 15 A No. You asked me whether or not I could
11:56:54 16 make certain conclusions based upon it and I did
11:56:56 17 take issue with that. You didn't ask me whether or
11:56:58 18 not I did look at advertising.

11:57:00 19 Q So you did review advertising?

11:57:02 20 A Yes, sir, I did.

11:57:04 21 Q But you didn't, you didn't have the
11:57:08 22 expertise to draw an inference as to how that
11:57:12 23 affected the common knowledge of the mix of
11:57:14 24 information or the common belief of people?

11:57:16 25 A Well, I had expertise as a historian with

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11:57:24 2 respect to advertising. First of all, my attempt in
11:57:26 3 terms of research was to ascertain smoking and
11:57:32 4 health information which was being disseminated.
11:57:34 5 And the smoking and health information is not
11:57:36 6 disseminated in advertising.

11:57:40 7 And certainly by 1955 the Federal Trade
11:57:46 8 Commission forbade the tobacco companies to deal
11:57:50 9 with health matters in advertising.

11:57:52 10 Secondly, I looked at advertising with
11:57:56 11 regard to education which was being pursued at this
11:57:58 12 time and earlier which taught kids in schools to be
11:58:00 13 very wary of advertising.

11:58:04 14 So I did not rely upon advertising as a
11:58:08 15 source of smoking and health information.

11:58:14 16 And lastly, in the Engle case I did a
11:58:16 17 random study looking at newspapers I had examined in
11:58:22 18 the Engle case to ascertain whether or not there
11:58:26 19 were advertisements and whether these advertisements
11:58:30 20 overwhelmed in sheer numbers the smoking and health
11:58:36 21 articles that were being disseminated in a sample of
11:58:38 22 newspapers, and I found to the contrary, that the
11:58:40 23 smoking and health advertisements or the smoking and
11:58:44 24 health articles far outweighed in sheer number those
11:58:46 25 of advertising by the tobacco companies.

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11:58:48 2 Q Did you review magazines when you did
11:58:48 3 that?

11:58:56 4 A I did not review magazines for the Engle
11:59:02 5 case in large part because the plaintiffs read
11:59:06 6 newspapers and very few magazines.

11:59:08 7 Q Have you reviewed magazines in preparation
11:59:08 8 for this case?

11:59:12 9 A Yes. And I have indicated I think with
11:59:18 10 regard to those magazines which were reviewed in
11:59:20 11 terms of my production list.

11:59:26 12 But the newspapers were far and away the
11:59:30 13 most important source.

11:59:32 14 Q There are many, many, many, many
11:59:36 15 advertisements for cigarettes in magazines, aren't
11:59:38 16 there?

11:59:40 17 MR. ALLINDER: I object to the form.

11:59:42 18 THE WITNESS: I don't know how to answer
11:59:44 19 that, many, many, many.

11:59:44 20 BY MR. FITZPATRICK:

11:59:46 21 Q There are a lot, aren't there?

11:59:50 22 A My experience, I am an avid reader, the
11:59:56 23 magazines that I read have very few advertisements.

11:59:58 24 Q What about the magazines that teenagers
12:00:00 25 read, do you take those into account?

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12:00:08 2 A During the period of my looking at
12:00:12 3 magazines with regard to preparation for this case I
12:00:30 4 did not read teenage magazines.

12:00:30 5 Q I apologize to the extent this is
12:00:34 6 repetitious but I want to make sure we get it right.
12:00:42 7 Can you tell me everything that you rely
12:00:48 8 on in reaching your conclusion that the health risks
12:00:54 9 of smoking were and are common knowledge? I want an
12:00:56 10 exhaustive list.

12:00:58 11 A And the exhaustive list since we have it
12:01:02 12 in front of me is on page 2 of my expert report. If
12:01:04 13 you would like to go through that I would be happy
12:01:04 14 to do it.

12:01:06 15 Q No, my question is, I guess, and I should
12:01:08 16 have made it clear, is there anything more than what
12:01:10 17 is here.

12:01:14 18 A Yes.

12:01:14 19 MR. ALLINDER: And, of course, for the
12:01:18 20 record, we know that there has been a reliance
12:01:22 21 list provided for this witness.

12:01:24 22 MR. FITZPATRICK: Yes. I am really
12:01:26 23 looking more substantively.

12:01:26 24 MR. ALLINDER: I understand.

25 BY MR. FITZPATRICK:

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12:01:32 2 Q If you can tell me other than the things
12:01:34 3 that you have listed here, have you done any other
12:01:38 4 work to determine what people know as opposed to
12:01:40 5 what they were exposed to?

12:01:44 6 A I think I have provided that in the
12:01:50 7 reliance list which you got, the 300 plus pages.
12:01:54 8 And at this point that represents the material on
12:02:14 9 which I have relied.

12:02:16 10 MR. ALLINDER: Let me interrupt. I want
12:02:18 11 to make sure there is not a misunderstanding
12:02:18 12 about this.

12:02:22 13 Dr. DiBacco has reviewed much material as
12:02:26 14 is indicated in his expert report, some of
12:02:28 15 which is listed in his reliance list that we
12:02:32 16 have provided to you which at the present time
12:02:34 17 contains the individual documents that he
12:02:36 18 intends to or may include in his testimony at
12:02:36 19 trial.

12:02:40 20 But there certainly is the larger body of
12:02:42 21 materials that he has reviewed as is indicated
12:02:46 22 in his expert report which is greater than the
12:02:48 23 reliance list itself.

12:02:48 24 MR. FITZPATRICK: I understand that.

12:02:50 25 MR. ALLINDER: Okay.

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12:02:52 2 MR. FITZPATRICK: It is the material on
12:02:58 3 which Dr. DiBacco bases his opinion is
12:03:00 4 generically of the type that is described in
12:03:06 5 the report?

12:03:06 6 MR. ALLINDER: I think that's what he
12:03:02 7 said, right.

12:03:02 8 THE WITNESS: Yes.

12:03:02 9 MR. FITZPATRICK: And with the exception
12:03:06 10 of, I am not sure whether the subscriber
12:03:10 11 depositions are referenced in here, but I would
12:03:12 12 take them as included.

13 BY MR. FITZPATRICK:

12:03:14 14 Q And my question is other than that, other
12:03:16 15 than the subscriber depositions and other than the
12:03:20 16 material generically listed in here, is there
12:03:22 17 anything else that you have relied upon to come to
12:03:26 18 the conclusions about general awareness or common
12:03:26 19 knowledge?

12:03:28 20 A I try to be very careful, Mr. Fitzpatrick,
12:03:34 21 in my expert report to designate on page 2 and page
12:03:38 22 3 that I have relied upon my education, teaching and
12:03:42 23 experience of 34 years which I can't quantify on the
12:03:50 24 reliance sheet, as well as the specific issues which
12:03:52 25 are contained in terms of the reliance material

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12:03:58 2 which are drawn from those specific areas which I
12:04:04 3 mention in terms of the top of page 3 there.

12:04:06 4 Q Fair enough. That general experience
12:04:10 5 includes the fact that many, many, many people
12:04:18 6 continue to smoke, in the millions, am I correct?

12:04:20 7 A That's general experience, yes, sir.

12:04:30 8 Q And it is fair to say that the tobacco
12:04:34 9 industry has sought to encourage people to continue
12:04:40 10 to smoke, am I right?

12:04:38 11 MR. ALLINDER: I object to the form.

12:04:40 12 THE WITNESS: Everyone who sells a product
:04:44 13 from common sense point of view, I am not an
12:04:46 14 expert in terms of marketing and the like,
12:04:50 15 would encourage people to buy their product

16 BY MR. FITZPATRICK:

12:04:54 17 Q And you have read materials, you have seen
12:04:58 18 ads and you have read the articles or statements by
12:05:00 19 the tobacco industry that tend to downplay or deny
12:05:02 20 the health risks associated with smoking, correct?

12:05:06 21 A I have, and I found that those latter are
12:05:10 22 minuscule compared to the materials which are
12:05:12 23 presented about the health risks of smoking.

12:05:14 24 Q You have seen the tobacco industry has
12:05:18 25 done that, I am not asking about the quantity, they

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12:05:18 2 have done that, is that correct?

12:05:20 3 A Yes. And I have indicated how that has
12:05:26 4 been done relative to disputing the matter of only
12:05:30 5 the statistical association with lung cancer as well
12:05:34 6 as the demand for more research and the search for
12:05:36 7 scientific causation.

12:05:38 8 Q And further they denied, outright denied
12:05:42 9 that smoking was addictive, isn't that correct?

12:05:42 10 MR. ALLINDER: I object to the form.

12:05:46 11 THE WITNESS: The tobacco industry given
12:05:48 12 the point in time, you didn't give me a point
:05:52 13 in time, you just indicated generally.

14 BY MR. FITZPATRICK:

12:05:54 15 Q Let's say any time up to and including
12:06:00 16 1995 did the tobacco industry ever admit that
12:06:02 17 smoking was addictive?

12:06:08 18 MR. ALLINDER: I object to the form.

12:06:10 19 THE WITNESS: The tobacco industry did not
12:06:12 20 to the best of my knowledge make that
12:06:16 21 statement. The Surgeon General made it in
12:06:18 22 1988.

23 BY MR. FITZPATRICK:

12:06:22 24 Q And it is fair to conclude that the
12:06:26 25 tobacco industry in arguing that there is need for

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12:06:28 2 more science or that it hasn't been established that
12:06:34 3 lung cancer is caused by smoking or that cigarette
12:06:36 4 smoking is not addictive, they have a point when
12:06:38 5 they do that, there is a reason for why they do
12:06:40 6 that, isn't that true?

12:06:42 7 MR. ALLINDER: I object to the form.

12:06:42 8 THE WITNESS: Well, you are asking me to
12:06:44 9 become an industry expert and I am not.

12:06:50 10 I can tell you that from my reading of the
12:06:54 11 literature that the term addiction has been
12:07:02 12 defined in one of two ways. One term is that
12:07:06 13 you cannot stop, and the other term is it is
12:07:10 14 very difficult to stop but many people can
12:07:10 15 stop.

12:07:16 16 My experience has been as a smoker that
12:07:22 17 you can become addicted, we didn't use the term
12:07:26 18 addicted, we used the fag fiend as I recall in
12:07:30 19 the 1950s, but that you can quit so I think
12:07:32 20 there is disagreement as to how you define
12:07:34 21 addiction.

22 BY MR. FITZPATRICK:

12:07:36 23 Q Still, I am asking you, you are an expert
12:07:38 24 on common knowledge, you are an expert on the
12:07:44 25 culture as a whole, you have read a great deal of

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12:07:46 2 material on the subject of smoking and health, you
12:07:50 3 have read a great deal of material by the tobacco
12:07:54 4 companies on the subject, my question is, why do you
12:08:00 5 think the tobacco industry continued and continues
12:08:04 6 to this day to question the link between smoking
12:08:08 7 and, let's say, lung cancer.

12:08:08 8 MR. ALLINDER: I object to the form.

12:08:10 9 THE WITNESS: You are asking for their
12:08:12 10 intent and I don't know the intent of the
12:08:12 11 tobacco companies.

12:08:12 12 BY MR. FITZPATRICK:

12:08:14 13 Q You can't draw the inference that they are
12:08:20 14 doing it to persuade smokers or to alleviate the
12:08:22 15 fears of smokers so that they will continue to
12:08:22 16 smoke?

12:08:24 17 A No. You are dealing with intent, I have
12:08:26 18 no way of dealing with that.

12:08:26 19 MR. ALLINDER: Excuse me, I object to the
12:08:28 20 form.

12:08:28 21 BY MR. FITZPATRICK:

12:08:28 22 Q You can't sitting here just make the
12:08:30 23 common sense inference that the reason why the
12:08:34 24 tobacco companies question or contend that there is
12:08:38 25 not a link between smoking and health is because

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12:08:40 2 they want people to continue smoking?

12:08:40 3 MR. ALLINDER: I object to the form.

12:08:42 4 THE WITNESS: As I indicated to you
12:08:46 5 before, my understanding of what I have read
12:08:48 6 through the literature of the tobacco
12:08:50 7 industry's position is that the tobacco
12:08:54 8 industry takes issue, took issue early on in
12:08:58 9 the 1950s with the statistical correlation,
12:09:02 10 urged more research, did not argue that smoking
12:09:06 11 was safe and urged further research as well as
12:09:10 12 the seeking of a scientific causation.
12:09:12 13 So that's my understanding through my
12:09:14 14 reading of the literature what the tobacco
12:09:20 15 industry was doing.

16 BY MR. FITZPATRICK:

12:09:22 17 Q That's your understanding in the context
12:09:22 18 of your other understanding that there was an
12:09:26 19 overwhelming body of information that smoking caused
12:09:30 20 health risks and that everybody else was aware of
12:09:30 21 it, right?

12:09:34 22 A There was an overwhelming public health as
12:09:40 23 well as other avenues which suggested, made very
12:09:42 24 clear to the general public that there were smoking
12:09:44 25 risks, that's correct.

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12:09:46 2 Q So everybody was aware of this except the
12:09:48 3 smoking companies, except the tobacco companies, is
12:09:50 4 that your testimony?

12:09:50 5 MR. ALLINDER: I object to the form.

12:09:52 6 THE WITNESS: No, that is not my
12:09:52 7 testimony.

12:09:54 8 My testimony is that the public health
12:10:00 9 community and many other areas of American life
12:10:02 10 from early on pointed to the health risks of
12:10:06 11 smoking. The tobacco company position was that
12:10:10 12 there should be more research because the
12:10:16 13 statistical correlation had been made and not
12:10:18 14 scientific determination.

12:10:20 15 The tobacco industry in my reading of the
12:10:22 16 materials did not indicate that smoking was
12:10:28 17 safe.

18 BY MR. FITZPATRICK:

12:10:30 19 Q And my question is are you not able to
12:10:34 20 draw an inference as to why they did that in light
12:10:36 21 of what the Surgeon General was saying or what in
12:10:40 22 light of what other health authorities were saying,
12:10:40 23 why?

12:10:42 24 MR. ALLINDER: I object to the form.

12:10:42 25 THE WITNESS: You should ask them. I am

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12:10:44 2 not an industry expert.

12:10:44 3 BY MR. FITZPATRICK:

12:10:46 4 Q But it is pretty clear, isn't it, that
12:10:54 5 they did it to persuade people to smoke?

12:10:54 6 A I don't know.

12:10:54 7 MR. ALLINDER: Same objection.

8 BY MR. FITZPATRICK:

12:10:56 9 Q Would you agree with me that the degree of
12:11:00 10 awareness is affected by the quality of the
12:11:02 11 information that is provided to the public on any
12:11:04 12 subject?

12:11:08 13 A I would say quality and quantity.

12:11:10 14 Q And it is affected by the source of that
12:11:12 15 information, is it not?

12:11:14 16 A It can be.

12:11:16 17 Q Certainly if the Surgeon General says it
12:11:20 18 it carries more weight than if you or I published an
12:11:24 19 ad saying that cigarette smoking is dangerous for
12:11:24 20 you?

12:11:28 21 A Polls reveal that indeed the Surgeon
12:11:30 22 General's stance with regard to health matters is
12:11:34 23 viewed very seriously by the public.

12:11:36 24 Q Would you agree with me if the
12:11:36 25 manufacturer of the product made the statement that

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12:11:42 2 cigarettes caused lung cancer, that that would
12:11:46 3 produce a higher degree of awareness in the general
12:11:56 4 public?

12:11:52 5 A I don't know with regard to the I the
12:11:56 6 awareness which is so widespread. I think people
12:11:58 7 look for information with regard to products from
12:12:02 8 many sources. The manufacturer is one source. But
12:12:06 9 the individual looks to many sources for
12:12:10 10 information. I don't know that with regard to
12:12:12 11 smoking.

12:12:14 12 What I do know is that there is a vast
12:12:16 13 body of information which has been disseminated and
12:12:20 14 become part of what I call common awareness with
12:12:22 15 regard to the health risks of smoking.

12:12:24 16 Q But you also testified that that has been
12:12:26 17 an incremental effect, is that right?

12:12:28 18 A It is incremental, no doubt about that,
12:12:30 19 and the incremental aspect of it would really start
12:12:40 20 before we have the plaintiffs in existence. In
12:12:42 21 other words, you don't have a Blue Cross in the
12:12:46 22 first part of the 20th century but you do have
12:12:50 23 already because of tobacco products the beginning of
12:12:52 24 this common knowledge.

2:13:00 25 Q Let's look at this issue of, the knowledge

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12:13:04 2 becomes incremental. And so to the extent it is
12:13:06 3 becoming incremental what we are really saying more
12:13:08 4 and more people know more and more about the
12:13:08 5 subject, correct?

12:13:10 6 A That's correct.

12:13:14 7 Q And I think you have already testified
12:13:18 8 that the numbers of people and the degree of
12:13:22 9 knowledge grew over the fifties and sixties and
12:13:24 10 seventies, correct?

12:13:26 11 MR. ALLINDER: I object to the form.

12:13:26 12 THE WITNESS: I think that's a fair
12:13:28 13 inference relative to the amount of material
12:13:30 14 that was coming out.

15 BY MR. FITZPATRICK:

12:13:38 16 Q Now, in 1964, let's just assume for a
12:13:42 17 moment that rather than contesting the Surgeon
12:13:50 18 General report, the tobacco industry publicly stated
12:13:56 19 that their product caused lung cancer, caused
12:14:06 20 emphysema, caused heart disease, would that not have
12:14:12 21 increased the awareness and made a greater degree of
12:14:14 22 awareness possible at an earlier time?

12:14:16 23 MR. ALLINDER: Objection.

12:14:16 24 THE WITNESS: That's speculative. I can't
12:14:20 25 deal with speculation. That's speculative,

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12:14:22 2 hypothetical.

3 BY MR. FITZPATRICK:

12:14:24 4 Q You are drawing conclusions as to how
12:14:28 5 people were aware by virtue of what was said and by
12:14:30 6 whom?

12:14:30 7 A That's correct.

12:14:32 8 Q I am asking you now, you can't draw an
12:14:34 9 inference whether the tobacco companies themselves,
12:14:36 10 manufacturers of the product, if they had come out
12:14:40 11 and said, this product kills, this product causes
12:14:42 12 lung cancer, that that would not have had an effect
:14:44 13 on the general awareness of the public?

12:14:46 14 MR. ALLINDER: I object to the form.

12:14:46 15 THE WITNESS: Again, I don't know, because
12:14:52 16 of the fact that so many individual other
12:14:54 17 sources of information are coming out which
12:14:58 18 tell you it is bad, and it is also clear from
12:15:00 19 reading the newspapers and doctors' advice
12:15:04 20 columns, and people writing in that people say,
12:15:06 21 it really doesn't matter what you say or
12:15:08 22 anybody else, I am going to smoke.

12:15:10 23 So I don't know. You are asking me a
12:15:12 24 hypothetical, speculative question.

25 BY MR. FITZPATRICK:

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DiBacco

12:15:14 2 Q I am not asking you what their conduct
12:15:16 3 would be, I am asking you about what their level of
12:15:20 4 awareness would be and the level of common knowledge
12:15:22 5 would be. And had the people who actually made the
12:15:26 6 product, who stood to gain if people bought it and
12:15:28 7 to lose if they didn't, had they come out and said,
12:15:32 8 this product causes lung cancer, would that not have
12:15:34 9 increased the degree of awareness in the society as
12:15:36 10 to the risks of smoking?

12:15:38 11 MR. ALLINDER: Objection.

12:15:38 12 THE WITNESS: I don't know. That's a
12:15:42 13 could have/would have/should have question. I
12:16:02 14 can't answer that.

12:16:02 15 BY MR. FITZPATRICK:

12:16:04 16 Q Is it common knowledge as to the degree of
12:16:10 17 risk of incurring, for example, lung cancer from
12:16:10 18 smoking?

12:16:18 19 A The degree of risk --

12:16:20 20 Q Do you know how more likely a smoker is to
12:16:26 21 incur lung cancer than a nonsmoker?

12:16:28 22 A From the literature that is being
12:16:34 23 disseminated, and it is not necessarily always the
12:16:40 24 same, but it is a, many times that of a nonsmoker.

12:16:44 25 The risks with respect to smoking are

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DiBacco

12:16:50 2 disseminated in the materials and often the risks
12:16:54 3 are couched with respect to other factors in a
12:16:58 4 person's life. For example, one of the newspapers
12:17:04 5 read, "Smoking and on the Pill, Write a Will,"
12:17:06 6 that's the title of a newspaper article.

12:17:08 7 So these risks are not necessarily
12:17:12 8 delineated by any specific quantification.

12:17:16 9 Q Do you know how many times more likely a
12:17:18 10 smoker than a nonsmoker is to get lung cancer from
12:17:20 11 smoking? I am sorry, let me rephrase that.

12:17:24 12 Do you know how more likely it is that a
12:17:28 13 smoker will get lung cancer than a nonsmoker?

12:17:34 14 A Well, from the literature that I have
12:17:34 15 read, it ranges from the statistics I have seen
12:17:40 16 quoted from five to ten times more likely. And it
12:17:44 17 is not necessarily one or the other. I have seen a
12:17:44 18 wide variety.

12:17:46 19 Q Do you believe that that is common
12:17:46 20 knowledge?

12:17:50 21 A I believe that people know that there are
12:17:50 22 risks.

12:17:52 23 Q I am just asking you a specific question.

12:17:52 24 A Yes.

12:17:54 25 Q Please answer my question.

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DiBacco

12:17:54 2 A Right.

12:17:56 3 Q Do you believe that it is common knowledge
12:18:02 4 among smokers, or the people, the population at
12:18:04 5 large, that if they smoke they have a five to ten
12:18:08 6 times as much chance of getting lung cancer than if
12:18:10 7 they don't smoke?

12:18:12 8 MR. BAILEY: Objection.

12:18:14 9 THE WITNESS: I don't know if they know
12:18:16 10 that specific figure but I think they do know
12:18:20 11 that there are a multi-fold risk.

12:18:22 12 BY MR. FITZPATRICK:

12:18:22 13 Q You would agree with me that tobacco
12:18:24 14 companies know that information, right?

12:18:26 15 MR. ALLINDER: I object to the form.

12:18:28 16 THE WITNESS: I don't know.

12:18:30 17 BY MR. FITZPATRICK:

12:18:30 18 Q Do you seriously doubt that they know it?

12:18:34 19 A Again, you are asking for speculation. I
12:18:36 20 don't know.

12:18:40 21 Q Do you know how more likely it is for a
12:18:42 22 smoker to get emphysema than for a nonsmoker?

12:18:48 23 A What I have read in terms of the
12:18:52 24 literature is that about 85 to 90 percent of all
12:18:56 25 emphysema cases are found in smokers.

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DiBacco

12:18:58 2 Q Do you believe that that is common
12:18:58 3 knowledge?

12:19:00 4 A I believe from the reading that I have
12:19:06 5 done that individuals know that there is an
12:19:08 6 increased risk. The specific percentage, I don't
12:19:12 7 think that's probably known commonly.

12:19:16 8 Q Do you know whether the tobacco industry
12:19:26 9 has ever revealed to the public at large that 85
12:19:30 10 percent of emphysema is caused by smoking?

12:19:30 11 MR. ALLINDER: Objection.

12:19:32 12 THE WITNESS: I don't know that.

13 BY MR. FITZPATRICK:

12:19:34 14 Q Do you know whether they ever revealed to
12:19:38 15 the public at large that a smoker is five to ten
12:19:42 16 times more likely to get lung cancer than a
12:19:44 17 nonsmoker?

12:19:44 18 MR. ALLINDER: Objection.

12:19:44 19 THE WITNESS: I don't know that.

20 BY MR. FITZPATRICK:

12:19:48 21 Q Do you know the increased risk that a
12:19:50 22 smoker has of incurring heart disease?

12:19:56 23 A Again, from reading the literature, it
12:20:00 24 varies, depending upon other factors in the person's
?:20:02 25 health, whether they have other maladies such as

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DiBacco

12:20:06 2 diabetes, if they had diabetes, it would be
12:20:10 3 increased, but it is several times that of someone
12:20:12 4 who does not smoke.

12:20:14 5 Q Do you know whether that information is
12:20:16 6 common knowledge?

12:20:18 7 A I believe what is common knowledge is that
12:20:22 8 there is a greater risk. The specific percentage in
12:20:26 9 terms of times, I don't think that's so.

12:20:32 10 Q And again, are you aware of the tobacco
12:20:38 11 industry ever informing the public -- well, let me
12:20:40 12 rephrase that.

12:20:42 13 Are you aware of the tobacco industry ever
12:20:44 14 telling the public that there are diseases
12:20:48 15 associated with smoking? Have they ever told the
12:20:50 16 public that?

12:20:56 17 A As I indicated before, I know of, at this
12:21:00 18 moment in looking at, thinking about the literature
12:21:02 19 which I have reviewed, the tobacco industry
12:21:04 20 statement is that which I indicated earlier and
12:21:20 21 therefore the answer to your question is no.

12:21:22 22 Q And I know we had a colloquy about this,
12:21:28 23 but just to be sure, you will not testify, you do
12:21:34 24 not plan to testify presently that the Blue Cross
12:21:40 25 subscribers were any more aware of the dangers of

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DiBacco

12:21:42 2 smoking than the public in general?

12:21:48 3 A At this point I am going to, I have

12:21:52 4 indicated that I will testify that Blue Cross/Blue

12:21:56 5 Shield subscribers had an additional layer of that

12:22:02 6 awareness. That doesn't mean in terms of any sort

12:22:06 7 of sophisticated formula or quality assessment, but

12:22:10 8 they had an additional layer of awareness. That's

12:22:10 9 what I am arguing.

12:22:14 10 Q Okay. But -- and I am sure your counsel

12:22:16 11 will advise you that it is important that you answer

12:22:18 12 this specific question.

12:22:18 13 A Okay.

12:22:18 14 Q Okay.

12:22:22 15 I understand that will be part of your

12:22:24 16 testimony. My question is a little different.

12:22:28 17 I am simply seeking to confirm that your

12:22:30 18 testimony at least at this point you do not intend

12:22:36 19 to opine that subscribers of Blue Cross are more

12:22:40 20 aware of the health risks associated with smoking

12:22:42 21 than the public at large, is that correct?

12:22:54 22 A No, that is correct.

12:22:58 23 MR. ALLINDER: Vin, how long do you intend

12:22:58 24 to go before lunch?

12:23:00 25 MR. FITZPATRICK: We can break now.

DiBacco

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12:23:02 2 MR. ALLINDER: I need a short break soon
12:23:04 3 if you intend to go for a while.
12:23:04 4 MR. FITZPATRICK: I hear you, I hear you.
12:23:08 5 THE VIDEOGRAPHER: Going off the record.
12:24:44 6 (At 12:24 p.m. a luncheon recess was
13:14:04 7 taken.)

Produced by R. K. R. C.
in
HUMPHREY

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DiBacco

AFTERNOON SESSION

1:16 p.m.

THE VIDEOGRAPHER: We are on the record.

You may begin.

BY MR. FITZPATRICK:

Q Good afternoon, Dr. DiBacco.

A Good afternoon, Mr. Fitzpatrick.

Q Did you in your gathering of materials on which to base your opinion consider any information disseminated to doctors by the tobacco industry?

A I had no way of considering such materials so I did not consider any of those materials, no, sir.

Q Did the tobacco companies or any of the attorneys inform you that the tobacco industry did send such materials to doctors?

MR. ALLINDER: I object to the form.

THE WITNESS: No, never mentioned that, never came up.

BY MR. FITZPATRICK:

Q Would you agree that it would be relevant to your testimony as to the degree of awareness to know what information was being disseminated to physicians by the tobacco industry?

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DiBacco

13:18:16 2 A It would be one source of information. It
13:18:18 3 would be a source of information that would be
13:18:20 4 considered along with the others. That would be a
13:18:24 5 source of information, yes, sir.

13:18:28 6 Q In your report you mention wellness
13:18:34 7 programs or educational programs engaged in by Blue
13:18:42 8 Cross with their subscribers relating to smoking and
13:18:42 9 health, correct?

13:18:44 10 A That's correct.

13:18:52 11 Q Are you aware that insurers in general
13:18:56 12 engaged in those activities or attempted to engage
13:18:56 13 in those activities?

13:19:00 14 A I was aware through the reading of the
13:19:04 15 literature that there were many, many groups of
13:19:08 16 which insurers were a part in terms of advising
13:19:12 17 their subscribers about the health risks of smoking
13:19:18 18 and offering certain incentives for them to quit.

13:19:24 19 Q Did you come across any documents that
13:19:28 20 indicated an attempt by the tobacco industry to
13:19:32 21 pressure life insurers and health insurers to
13:19:36 22 refrain from engaging in such educational
13:19:36 23 activities?

13:19:44 24 A No, sir. The only thing I came across was
13:19:44 25 I believe in reading the complaint which your

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DiBacco

13:19:50 2 company filed, there were references to that.

13:19:54 3 Q But you were not provided by defendants

13:19:58 4 with any documents that would reflect those

13:20:00 5 activities by the tobacco companies?

13:20:00 6 MR. ALLINDER: I object to the form.

13:20:04 7 THE WITNESS: Remember, I'm going into the

13:20:08 8 public realm, that which is public, and

13:20:10 9 therefore I dealt with all those records from

13:20:12 10 newspapers to books to magazines that were in

13:20:14 11 the public arena. So I was not provided with

13:20:18 12 any private documents, no, sir.

13 BY MR. FITZPATRICK:

13:20:30 14 Q Have you ever been qualified as an expert

13:20:40 15 to testify about common knowledge on any subject?

13:20:40 16 MR. ALLINDER: I object to the form.

13:20:42 17 THE WITNESS: In terms of --

13:20:44 18 MR. FITZPATRICK: Excuse me.

13:20:46 19 What is the problem with that one? I will

13:20:48 20 correct it if there is a problem.

13:20:50 21 MR. ALLINDER: Okay. You are, if I

13:20:54 22 understand your question, and this is where I

13:20:56 23 am not sure that it is clear either to me or to

13:21:02 24 the witness, are you asking Dr. DiBacco what

13:21:06 25 his understanding is with respect to a ruling

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DiBacco

13:21:12 2 by any court as to his qualifications as an
13:21:16 3 expert to testify by opinion evidence or
13:21:20 4 opinion testimony on the subject of common
13:21:26 5 knowledge?

13:21:22 6 MR. FITZPATRICK: Yes, that's right.

13:21:22 7 MR. ALLINDER: I don't think your question
13:21:24 8 was that clear.

13:21:26 9 MR. FITZPATRICK: Fair enough, that's why
13:21:28 10 I question you.

13:21:28 11 MR. ALLINDER: Okay.

13:21:30 12 BY MR. FITZPATRICK:

13:21:30 13 Q So with that amendment, my question is
13:21:36 14 have you to the best of your knowledge ever been the
13:21:42 15 subject of a court ruling that you were qualified as
13:21:46 16 an expert to testify on the subject of common
13:21:52 17 knowledge among the American public.

13:21:54 18 A To the best of my knowledge, I have no
13:22:06 19 knowledge of that.

13:22:14 20 Q And prior to today have you ever testified
13:22:22 21 in any forum about the common knowledge of the
13:22:24 22 American people on any subject?

13:22:26 23 MR. ALLINDER: I am going to object. You
13:22:28 24 want me to explain again?

13:22:30 25 MR. FITZPATRICK: Yes.

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DiBacco

13:22:32 2 MR. ALLINDER: I think your question is
13:22:36 3 intended still to look at his testimony as an
13:22:40 4 expert witness in a smoking and health cases.
13:22:42 5 I don't think your question is so limited.

13:22:42 6 MR. FITZPATRICK: No, I am sorry, I meant
13:22:46 7 it to be broader than that. I wanted to know,
13:22:48 8 I am looking at his qualifications to testify
13:22:52 9 about common knowledge. And my question is:

10 BY MR. FITZPATRICK:

13:22:54 11 Q Have you ever testified in any forum on
13:22:58 12 the subject of the common knowledge of the American
:23:00 13 people?

13:23:06 14 MR. ALLINDER: Objection. Testified in
13:23:10 15 any forum, judicial, regulatory, administrative
13:23:12 16 proceeding, is that the idea?

13:23:14 17 MR. FITZPATRICK: I mean anywhere, any
13:23:16 18 testimony whatsoever.

13:23:16 19 MR. ALLINDER: But you are seeking to
13:23:20 20 distinguish by your question any publications
13:23:24 21 or speeches that he may have had as a historian
13:23:28 22 over the years about matters of common
13:23:30 23 knowledge to the American public?

13:23:32 24 MR. FITZPATRICK: Yes, I will ask that
:23:23:32 25 next.

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DiBacco

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MR. ALLINDER: Okay.

13:23:34 3

MR. FITZPATRICK: What I am addressing my

13:23:38 4

question to is testimony. And I am including

13:23:40 5

in that any kind of testimony, regulatory,

13:23:42 6

court, whatever.

13:23:42 7

MR. ALLINDER: Trial, deposition?

13:23:44 8

MR. FITZPATRICK: Any.

13:23:46 9

MR. ALLINDER: Okay.

10 BY MR. FITZPATRICK:

13:23:50 11

Q Have you ever testified prior to today on

13:23:54 12

the subject of the common knowledge of the American

13:23:58 13

people on any subject?

13:23:58 14

MR. ALLINDER: Objection.

13:24:00 15

Go ahead.

13:24:02 16

THE WITNESS: Only as it related to the

13:24:06 17

plaintiffs in the Engle case. There was some

13:24:10 18

reference to that.

19 BY MR. FITZPATRICK:

13:24:16 20

Q Have you written, have you published any

13:24:20 21

peer-reviewed articles on the subject of the common

13:24:22 22

knowledge of the American people about any subject?

13:24:26 23

A I have written peer-reviewed articles

13:24:30 24

about the common knowledge of specific groups of the

13:24:38 25

American people about certain topics.

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DiBacco

13:24:40 2 Q Let's start with the topics. Do any of
13:24:42 3 those include tobacco?

13:24:42 4 A No, sir.

13:24:46 5 Q Or health risks associated with tobacco?

13:24:50 6 A They do not, to the best of my knowledge.

13:24:54 7 Q Can you tell me what groups you have
13:24:54 8 written about?

13:24:58 9 A My doctoral work was in the field of
13:25:06 10 attitudes with respect to dissertation on American
13:25:10 11 business attitudes toward certain government
13:25:14 12 programs and that dealt with the issue of what
13:25:18 13 they knew and how they attempted to deal with what
13:25:20 14 they knew in influencing the American government.
13:25:26 15 My master's work, like my doctoral work,
13:25:30 16 also dealt in that, I dealt with newspapers in
13:25:32 17 colonial America attempting to find out information
13:25:38 18 about a colonial figure by the name of Thomas McKean
13:25:44 19 who lived in the area of Delaware in Philadelphia.

13:25:46 20 Most of my peer-review articles deal with
13:25:54 21 attitudes, knowledge of the specific groups. For
13:26:00 22 example, I did articles on American business
13:26:04 23 magazines' and newspapers' reaction to the Vietnam
13:26:14 24 war. I did articles with regard to certain facets
13:26:20 25 of, of reaction the American, certain facets of the

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DiBacco

13:26:26 2 American population's reactions to new inventions in
13:26:30 3 terms of how they reacted and what their beliefs
13:26:36 4 were.

13:26:34 5 In addition to peer-reviewed articles, I
13:26:40 6 have done many articles for newspapers which have
13:26:44 7 looked at the reaction of the American people to,
13:26:48 8 again, certain products which have been produced,
13:26:54 9 products ranging from the microwave oven to electric
13:26:58 10 light bulbs. Much of my work has been in the field
13:27:02 11 of what we call social history which is the reaction
13:27:08 12 of people to things in their everyday life.

13:27:10 13 Q Have you written on the reaction of people
13:27:16 14 to tobacco, to cigarettes?

13:27:22 15 A I have not done specific work with regard
13:27:26 16 to, to the best of my knowledge, with regard to
13:27:32 17 American people's reactions to tobacco and
13:27:36 18 cigarettes. The only thing I can recall at this
13:27:42 19 point is that I did do an article a number of years
13:27:48 20 ago in which I pointed out how there were in the
13:27:54 21 19th century and even earlier in the 18th century
13:27:58 22 some groups which attempted to sell tobacco products
13:28:02 23 for therapeutic purposes, that it would be
13:28:04 24 medicinally good for you.

13:28:12 25 And I do recall I have a chapter in my

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DiBacco

13:28:16 2 book entitled Made in the USA, a chapter on William
13:28:20 3 Byrd, II of Westover who was an early Virginian who
13:28:26 4 also promoted therapeutic use of tobacco in 17th and
13:28:36 5 18th century Virginia.

13:28:38 6 Q What do you consider your expert
13:28:44 7 credentials to enable you to render an expert
13:28:50 8 opinion on the common knowledge of the American
13:28:52 9 people?

13:28:54 10 MR. ALLINDER: I object to the form.

13:28:56 11 THE WITNESS: I consider that I have for
13:29:02 12 35 years been one of a group of historians
:29:06 13 using newspapers and periodicals and similar
13:29:08 14 sources which are identified in my expert
13:29:14 15 report to fathom aspects of everyday life.

13:29:20 16 I think I have done that in terms of my
13:29:22 17 peer-reviewed articles.

13:29:26 18 My first peer-review article which
13:29:28 19 appeared in the Harvard Business History
13:29:32 20 Review, the editors said, this is a fascinating
13:29:34 21 article but we have never published anything
13:29:36 22 which is based so much on newspapers and
13:29:40 23 magazines. They finally published it.

13:29:42 24 And since that time there has been a
:29:46 25 growing body of scholars working in the field

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DiBacco

13:29:52 2 of attempting to recreate American life and
13:29:54 3 popular attitudes as revealed by study of
13:29:58 4 newspapers and magazines and media to which
13:30:00 5 people have been exposed.

13:30:04 6 That field is deemed social history.. I
13:30:06 7 read an article in the Organization of American
13:30:08 8 Historians the other day which pointed out that
13:30:12 9 this is one of the leading fields among
13:30:14 10 students and scholars today.

11 BY MR. FITZPATRICK:

13:30:22 12 Q Prior to your -- strike that.

13:30:28 13 Have you ever made a study of the tobacco
13:30:28 14 industry?

13:30:32 15 A I have never made a study of the tobacco
13:30:42 16 industry. I have referenced the tobacco industry,
13:30:46 17 as I recall, in my textbook, History of the United
13:30:52 18 States. I have referenced the tobacco industry only
13:30:58 19 as one of the several industries which emerged in
13:31:00 20 the late 19th century in my book, Made in the USA.
13:31:06 21 But these were all references as opposed to any
13:31:08 22 detailed analysis.

13:31:14 23 Q You haven't taken, undertaken a study of
13:31:22 24 the behavior of the tobacco industry in dealing with
13:31:32 25 the subject of smoking and health from the 1950s to

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DiBacco

13:31:32 2 date?

13:31:36 3 MR. ALLINDER: I object to the form.

4 BY MR. FITZPATRICK:

13:31:38 5 Q Have you?

13:31:38 6 A No, I have not done a study of the tobacco
13:31:44 7 industry in terms of the period from the 1950s to
13:31:50 8 the present, only as that material was revealed to
13:31:52 9 me through the newspapers and magazines that I
13:31:56 10 surveyed and other materials.

13:32:00 11 Q Prior to your initial retention by the
13:32:06 12 tobacco companies to act as an expert for them in I
13:32:08 13 believe you said 1995?

13:32:10 14 A Five, that's correct, sir.

13:32:16 15 Q Had you done studies concerning the
13:32:22 16 attitudes of the American people about cigarettes or
13:32:24 17 smoking and health?

13:32:26 18 A I believe I had done articles which
13:32:34 19 referenced coined phrases such as fag fiend, coffin
13:32:38 20 nails, paper pipes, which was the first time one way
13:32:42 21 cigarettes were referenced. I think I had done some
13:32:46 22 reference only in terms of, of looking at some
13:32:50 23 coined phrases, but with no specific focus on this
13:32:58 24 industry in terms of a focused analysis, and other
13:33:02 25 than the references I gave to my textbook, Made in

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DiBacco

13:33:06 2 the USA, the other book, but, no.

13:33:08 3 Q Just to clarify one thing, when we are
13:33:12 4 talking about a fag fiend, fag is used in that term
13:33:12 5 to mean cigarette, right?

13:33:14 6 A Excuse me?

13:33:16 7 Q Fag means cigarette in that context?

13:33:18 8 A That is correct, absolutely, yes. That's
13:33:22 9 a term that was common in the 1950s and it should be
13:33:26 10 very clear, that's the only reference. But that term
13:33:32 11 was widely used in the 1950s and I was a young
13:33:42 12 person in that era and that is the term we used and
13:33:44 13 it was not "pejorative" in any sense of the word.

13:33:44 14 Q You mentioned earlier, and I forgot to
13:33:46 15 follow up on it, that you had consulted with
13:33:48 16 Dr. Gary black?

13:33:48 17 A Greg Black.

13:33:54 18 Q Greg Black. What did you consult with him
13:33:54 19 about?

13:33:58 20 A I had found by virtue of my research in
13:34:02 21 looking and going through research materials that
13:34:08 22 there had been a collection made by a business
13:34:12 23 professor at the University of Kansas City --
13:34:16 24 Missouri, Kansas City. The collection was called
13:34:20 25 the Peter Dart Collection. And he was a professor

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DiBacco

13:34:24 2 in the field of mass communication and television, I
13:34:28 3 think it was still in the college of business, and
13:34:34 4 during his period of tenure at the university had
13:34:36 5 collected many, many films.

13:34:40 6 And I thought that I would like to see
13:34:44 7 those. And Mr. Dart, Professor Dart had left the
13:34:48 8 university and I found that Mr. Black had access to
13:34:48 9 those.

13:34:52 10 Q And did Professor Black provide you with
13:34:54 11 substantive information or did he merely point you
13:34:58 12 to the materials and let you view them?

13:35:00 13 A Both, in other words, he provided me with
13:35:02 14 the details of how this was done and I was able to
13:35:06 15 get the actual films that I wanted to get.

13:35:14 16 Q Are you, I don't mean to belabor it but I
13:35:16 17 have to get it clear, are you in giving your
13:35:20 18 testimony relying on anything that Professor Black
13:35:20 19 told you?

13:35:26 20 A No, not in terms of conversations. I am
13:35:30 21 relying upon the actual result, the films which are
13:35:30 22 included.

13:35:32 23 Q You are relying on the materials he gave
13:35:34 24 you access to?

13:35:34 25 A That's correct.

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DiBacco

13:35:34 2 Q Okay.

13:35:34 3 A That's correct.

13:35:40 4 Q I know that there is, from looking at your
13:35:42 5 other testimony that you participated in a video
13:35:44 6 made for the, or in conjunction with the University
13:35:46 7 of Notre Dame, is that right?

13:35:46 8 A That's correct.

13:35:50 9 Q Can you tell me what that video is about?

13:35:52 10 A That video is about the issue of

13:35:54 11 legislating morality.

13:36:00 12 I was asked by the University of Notre

:36:06 13 Dame. I believe it was in 1996, to do a segment for
13:36:10 14 what they called their Golden Dome Productions which
13:36:18 15 ran on PBS. And I was asked to do a 30 minute
13:36:20 16 segment dealing with how difficult it is to
13:36:22 17 legislate morality.

13:36:32 18 And as part of that film we dealt with a
13:36:36 19 number of issues and we had many notables there. I
13:36:40 20 got former Governor Mario Cuomo to become a part of
13:36:46 21 it, I got the head of the American Civil Liberties
13:36:50 22 Union to be a part of it, Nadine Schneider, and
13:36:54 23 several other professors to contribute to that, in
13:36:58 24 which there was a debate as to whether or not we can
3:37:02 25 in fact legislate morality.

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DiBacco

13:37:08 2 Q Did you yourself engage in debate on the
13:37:08 3 video?

13:37:10 4 A I was one of the commentators, yes, sir.

13:37:16 5 Q Did the subject of smoking and health or
13:37:20 6 the tobacco industry, was that discussed in the
13:37:20 7 video?

13:37:22 8 A It was discussed in that, that is correct.

13:37:26 9 Q If you can recall, can you give me the
13:37:29 10 general gist of your comments on that subject?

13:37:34 11 A To the best of my recollection as I sit
13:37:38 12 here today, I believe what I indicated in that
13:37:42 13 particular discussion or dialogue that was going on
13:37:48 14 is that the best way to deal with the issue of
13:37:54 15 legislating morality is not to legislate so much as
13:37:58 16 to let time pass because education is the great
13:37:58 17 healer.

13:38:04 18 And I gave as several examples the alcohol
13:38:08 19 industry in which the consumption of alcohol today
13:38:12 20 has declined, and the tobacco industry in which the
13:38:16 21 consumption of cigarettes, the number of smokers has
13:38:18 22 decreased.

13:38:20 23 I also gave, as I recall, although I am
13:38:24 24 not for sure, the fact that education has also
13:38:28 25 resulted in a drop in the number of abortions that

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13:38:30 2 are being performed today.

13:38:32 3 And I think that was the general tenor of
13:38:40 4 my comments, namely, that education about alleged
13:38:48 5 evils is the way in which to deal with those.

13:38:50 6 Q Doesn't that logically lead to the
13:38:56 7 conclusion that had the tobacco industry in 1964 set
13:39:02 8 out to educate the American people about the dangers
13:39:06 9 of smoking, that there would have been an earlier
13:39:12 10 decrease in the amount of smoking?

13:39:12 11 MR. ALLINDER: I object to the form.

13:39:14 12 THE WITNESS: Well, again, I think that is
13:39:18 13 speculative. That is a could have/would
13:39:20 14 have/should have.

13:39:22 15 What I do know from the record is that the
13:39:24 16 education which was provided by the ACS, the
13:39:26 17 Surgeon General and all of these groups did in
13:39:32 18 fact have an impact in terms of action.

19 BY MR. FITZPATRICK:

13:39:34 20 Q Isn't it fair to say you also know in your
13:39:36 21 expertise and your study that had the tobacco
13:39:42 22 industry engaged in such action there would have
13:39:44 23 been even a greater decrease?

13:39:46 24 A Again it is speculative. What I do know
13:39:48 25 is, sir, that the cup of knowledge with regard to

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13:39:52 2 the health risks of smoking was full. What you are
13:39:56 3 saying would another drop have made a difference, I
13:39:56 4 don't know.

13:39:58 5 Q Well, I am not talking about a drop, I am
13:40:02 6 talking about the tobacco industry coming out itself
13:40:08 7 and saying smoking causes lung cancer, smoking
13:40:08 8 causes emphysema, smoking is addictive, had they
13:40:12 9 done that rather than argue about it, don't you
13:40:14 10 sitting here today, don't you believe that people
13:40:18 11 would have heard that and that it would have reduced
13:40:18 12 the amount of smoking?

13:40:22 13 A Again, it is speculation and I can't, I
13:40:26 14 can't deal with that. I am sorry.

13:40:28 15 MR. FITZPATRICK: I would like to request,
13:40:30 16 Bill, a copy of that video. I know from the
13:40:32 17 Engle transcript that you have obtained access
13:40:38 18 to the video Notre Dame --

13:40:38 19 MR. ALLINDER: I will get back to you.

13:40:38 20 MR. FITZPATRICK: Thank you.

13:40:40 21 MR. ALLINDER: I will have to check on
13:40:40 22 that, I will get back to you.

13:40:46 23 MR. FITZPATRICK: Thank you.

24 BY MR. FITZPATRICK:

13:40:48 25 Q I don't mean to belabor it, but is it your

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13:40:54 2 testimony that the tobacco industry's position on
13:40:56 3 smoking and health and their statements about
13:41:02 4 smoking and health had no effect on the public
13:41:04 5 awareness about smoking and health?

13:41:10 6 A No. My testimony is that the message of
13:41:18 7 smoking and health was given enormous quantitative
13:41:22 8 and qualitative emphasis in the media, and that of
13:41:28 9 the tobacco industry was given essentially very
13:41:30 10 little.

13:41:30 11 Q Okay, but my question is a little more
13:41:30 12 specific than that.

13:41:34 13 A Accepting that is your testimony, I am
13:41:38 14 asking you if it is also your testimony that the
13:41:42 15 statements of the tobacco industry had no effect on
13:41:44 16 the body of common knowledge or the general
13:41:46 17 awareness of the American people.

13:41:50 18 A I don't know that.

13:41:56 19 Q You testified that the Blue Cross plans
13:41:58 20 provided information to their subscribers about
13:42:06 21 smoking and health. Do you recall which ones have
13:42:06 22 you ascertained that to be the case?

13:42:12 23 A I referenced those in my expert report.
13:42:18 24 First of all, the Empire.

13:42:20 25 Q Let me maybe to shorten this, not to

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13:42:22 2 interrupt you, other than the ones that are in the
13:42:24 3 report, I am sorry, that's really what I meant to
13:42:26 4 ask. Other than the plans that you mentioned in the
13:42:28 5 report, have you made a study of the other plans in
13:42:30 6 this case to see whether they disseminated the same
13:42:32 7 type of information to their subscribers?

8 A Yes. And I was aided by the fact there is
13:42:42 9 a book published by Blue Cross/Blue Shield entitled
13:42:44 10 Wellness at Work which delineates up to the year
13:42:50 11 1982 all of the steps that had been made by Blue
13:42:56 12 Cross associations across the country. And that
13:43:00 13 book which was published by Blue Cross/Blue Shield
13:43:06 14 in 1982 delineates those in addition to those which
13:43:08 15 are listed in my expert report.

13:43:10 16 Q Sitting here today, what I am going to do
13:43:12 17 is, I am sure you couldn't, I couldn't name by
13:43:14 18 memory the various Blue Cross plaintiffs in this
13:43:16 19 case but I am going to go through them and tell me
13:43:18 20 if you have any information as to whether those
13:43:22 21 specific plans disseminated information --

13:43:22 22 A Okay.

13:43:24 23 Q -- of health risks.

13:43:26 24 New Hampshire.

13:43:34 25 A New Hampshire did. New Hampshire's plan,

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13:43:38 2 as I recall from my reading, was dissemination of
13:43:44 3 American Cancer Society materials against smoking.

13:43:46 4 Q The Delaware plan?

13:43:52 5 A Delaware had a plan called SHAPE, Safety
13:43:58 6 and Health -- Safety, Health and Physical Education,
13:44:02 7 and it was so noted in the Wellness at Work book.
13:44:08 8 And it recommended that subscribers as well as
13:44:14 9 employees refrain from smoking, watch their eating
13:44:18 10 and, in other words, make prudent lifestyle choices,
13:44:22 11 and in Delaware it was called SHAPE.

13:44:22 12 Q Do you remember when that happened?

13:44:26 13 A 1980, '81, in that period, that's my best
13:44:28 14 recollection.

13:44:30 15 Q Let me ask this before I go on.

13:44:32 16 What to the best of your knowledge, what
13:44:42 17 is the earliest time that any Blue Cross plan in
13:44:46 18 this case disseminated these types of materials,
13:44:48 19 that is educational materials about smoking and
13:44:50 20 health, to its subscribers?

13:44:54 21 A The first one I can recall as I sit here
13:45:00 22 today is the Minnesota plan. They devised --

13:45:02 23 Q I am sorry, Minnesota is not in the case.

13:45:04 24 I am just trying to limit it to the --

13:45:06 25 A I am sorry, I thought it was. My

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13:45:08 2 complaint had its -- no?

13:45:08 3 Q No.

13:45:10 4 A Okay.

13:45:10 5 Q Minnesota --

13:45:12 6 MR. FITZPATRICK: Go off the record a
13:45:14 7 minute.

13:45:14 8 THE VIDEOGRAPHER: Off the record.

13:45:40 9 (Discussion off the record.)

13:45:45 10 THE VIDEOGRAPHER: We are on the record.

11 BY MR. FITZPATRICK:

13:45:46 12 Q Okay.

:45:56 13 A Okay. 1973 I found reference to one of
13:46:02 14 the plans in New York if not more than one, Blue
13:46:06 15 Cross/Blue Shield encouraging with the cooperation
13:46:14 16 of, of employers like Prudential Life Insurance,
13:46:20 17 General Telephone, Hughes Aircraft, 1973 was the
13:46:26 18 first that I can recall in terms of a lifestyle
13:46:30 19 change, and I believe that was one or more of those
13:46:34 20 in New York because they established at the same
13:46:36 21 time just a few years later their health education
13:46:36 22 center.

13:46:40 23 Q Now, going back to the New Hampshire plan,
13:46:42 24 do you recall when they first did --

13:46:44 25 A No, I do not, not the specific date.

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13:46:48 2 Q And you may have told me Delaware, I don't
13:46:48 3 remember --

13:46:52 4 A SHAPE, early eighties, '80, 81, 82.

13:46:54 5 Q Georgia, did they --

13:46:58 6 A Georgia, found very little relative to
13:47:08 7 Georgia materials at this point. I cannot recall at
13:47:08 8 this point.

13:47:10 9 Q Michigan.

13:47:18 10 A Michigan, Michigan had a program called Go
13:47:14 11 to Health which was inaugurated, and again
13:47:20 12 delineated in the Blue Cross book, 1982, which was
13:47:26 13 designed to get people to recognize the need to quit
13:47:30 14 smoking, which what they eat, drink, et cetera.

13:47:34 15 Q Do you recall when they did that program?

13:47:38 16 A Sometime before 1982. It would have been
13:47:40 17 again the early eighties, late seventies.

13:47:42 18 Q The Florida plan.

13:47:50 19 A Florida to the best of my knowledge, as I
13:47:54 20 sit here today, got very little material through the
13:47:58 21 discovery process on Florida, so I am at the mercy
13:48:04 22 of those discovery, precious little.

13:48:06 23 Q DC, District of Columbia.

13:48:12 24 A DC, only in the sense that I was a
13:48:18 25 subscriber at the time and I cannot recall anything

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DiBacco

13:48:20 2 from what was called Group Hospitalization at the
13:48:22 3 time.

13:48:30 4 Q California Blue Shield.

13:48:32 5 MR. ALLINDER: Stop just a moment.

13:48:34 6 You are not meaning to draw any
13:48:36 7 distinction between Blue Cross and Blue Shield
13:48:38 8 in your questions, are you?

13:48:38 9 MR. FITZPATRICK: Here I am.

13:48:40 10 MR. ALLINDER: You are here, okay.

13:48:42 11 MR. FITZPATRICK: Yes, because for the
13:48:44 12 simple reason California Blue Cross is not a
:48:48 13 party to the case, they are separate entities.

13:48:50 14 MR. ALLINDER: You have used two or three
13:48:52 15 different terms before and I have not stopped
13:48:52 16 you.

13:48:54 17 MR. FITZPATRICK: I did because simply
13:48:56 18 there is a distinction in California because
13:49:00 19 the Blue Shield and the Blue Cross sides split,
13:49:02 20 unlike in the others, and in this case the only
13:49:04 21 plaintiff is California Blue Shield, that is
13:49:06 22 the sole reason for referring to it as
13:49:08 23 California Blue Shield.

13:49:10 24 MR. ALLINDER: You got the question?

13:49:10 25 THE WITNESS: Yes, got it.

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DiBacco

13:49:12 2

MR. ALLINDER: Okay.

13:49:14 3

THE WITNESS: As I recall, California Blue

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Shield was involved in the first American

13:49:22 5

Smokeout, as I recall, which was before the

13:49:28 6

National Smokeout which was created in 1977.

13:49:30 7

California was the first state to do that.

13:49:38 8

And as I recall, California Blue Shield

13:49:40 9

may have been a part of that. I believe it

13:49:44 10

was. And the idea spread the next year to

13:49:48 11

other Blue Cross/Blue Shield, Empire being the

13:49:50 12

most notable one.

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BY MR. FITZPATRICK:

13:49:58 14

Q Without taking up your time on all of

13:50:06 15

these, do you recall, other than the example you

13:50:10 16

have already given, any Blue Cross/Blue Shield plan

13:50:16 17

engaging in these educational activities about

13:50:22 18

smoking and health prior to the late 1970s?

13:50:24 19

MR. ALLINDER: I am sorry, part of your

13:50:26 20

question was other than what he has indicated

13:50:28 21

already?

13:50:28 22

MR. FITZPATRICK: Yes, yes.

13:50:28 23

MR. ALLINDER: All right.

13:50:30 24

THE WITNESS: What I already indicated.

13:50:32 25

I am trying to think, to the best of my

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DiBacco

13:50:36 2 recollection, the Blue Cross/Blue Shield
13:50:40 3 supported book entitled Take care Of Yourself,
13:50:44 4 which was by Donald Vickery and James Fries
13:50:48 5 which was adopted and urged to be distributed
13:50:54 6 to subscribers was 1977, and the film, You
13:50:58 7 Can't Buy Health, which was done by Blue Shield
13:51:02 8 Association, was also 1977, so I would say with
13:51:08 9 those, with what I have already mentioned, I
13:51:12 10 think it would be certainly in the seventies,
13:51:14 11 most of these are in the seventies, yes.

12 BY MR. FITZPATRICK:

:51:16 13 Q And some later?

13:51:16 14 A Many later, yes, sir.

13:51:28 15 Q In the -- changing gears now -- in the
13:51:34 16 materials on smoking and health you have revealed --
13:51:38 17 I mean that you have reviewed, did you find much
13:51:44 18 references, many references to the constituents in
13:51:46 19 tobacco smoke?

13:51:48 20 A Yes. There were articles which dealt with
13:51:52 21 the constituents in tobacco smoke from the 1950s all
13:51:54 22 the way through.

13:51:56 23 Q Could you quantify -- do you know, for
13:52:00 24 example, how many chemical constituents there are in
13:52:02 25 cigarette smoke?

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DiBacco

13:52:04 2 A Well, I have seen numbers from hundreds to
13:52:06 3 thousands. There are many.

13:52:14 4 Q Do you know how many known carcinogens are
13:52:16 5 contained in cigarette smoke?

13:52:20 6 A I can recall only when I was questioned by
13:52:24 7 Mr. Rosenblatt that he indicated there were so many,
13:52:26 8 I think it was 27 and the like. But I am not a, you
13:52:28 9 know, a scientist.

13:52:32 10 I have read the public literature in
13:52:34 11 newspapers and magazines which indicate there are
13:52:36 12 many chemical constituents.

13:52:38 13 Q Let me turn it around a little bit. It is
13:52:42 14 fair to say that you would not consider it part of
13:52:44 15 the common knowledge of the American people as to
13:52:48 16 how many carcinogens are contained in cigarette
13:52:50 17 smoke, is that fair?

13:52:52 18 A I think it is fair to say that they know
13:52:56 19 that there are carcinogens, I don't know whether or
13:52:58 20 not they know how many.

13:53:06 21 Q Would the same be true of other chemical
13:53:10 22 constituents, that they know there are some but they
13:53:12 23 don't know how many?

13:53:14 24 A I think there is widespread awareness with
13:53:18 25 respect that there are carcinogens. Whether these

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DiBacco

13:53:24 2 can be delineated by name and by number, I don't
13:53:26 3 think that's the case. I don't know.

13:53:34 4 Q Do you have any opinions as to the
13:53:44 5 American people's awareness of the relative risks
13:53:52 6 associated with smoking?

13:53:54 7 MR. ALLINDER: I object to the form.

13:53:56 8 THE WITNESS: You have to define what you
13:53:58 9 mean by relative risks.

10 BY MR. FITZPATRICK:

13:54:00 11 Q How risky it is. You have testified that
13:54:08 12 they know that there is a risk. When we step out
13:54:12 13 into the street there is a risk of getting hit by a
13:54:20 14 car. On the other hand, if you run out into a Los
13:54:22 15 Angeles freeway there is a lot higher risk of
13:54:26 16 getting hit by a car. So I am drawing that type of
13:54:26 17 distinction in terms of relative risk.

13:54:32 18 Have you reached any conclusions as to the
13:54:38 19 public's awareness of the relative risk of smoking
13:54:40 20 cigarettes?

13:54:42 21 MR. ALLINDER: I object to the form.

13:54:46 22 THE WITNESS: Again, I am not certain what
13:54:52 23 you mean by relative risk. Relative to what?

13:54:54 24 My understanding from looking at the
13:54:58 25 literature is that there has been more precise

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DiBacco

13:55:06 2 refinement in terms of risk taking with regard
13:55:06 3 to smoking.

13:55:10 4 In the early years when the health
13:55:16 5 warnings went out there was, of course, general
13:55:22 6 awareness. And now in recent years there has
13:55:24 7 been more specific I think refinement in terms
13:55:28 8 of what the risks might be. And those have
13:55:32 9 been aided by rotating warnings on cigarettes
13:55:36 10 and advertisements and things of this sort.
13:55:42 11 But I can't quantify that. I could not say in
13:55:48 12 relation to walking on a freeway or not smoking
:55:50 13 in terms of three cigarettes a day or six, no,
13:55:52 14 I have no knowledge of that.

13:56:02 15 MR. FITZPATRICK: Let's just take a minute
13:56:04 16 off the record.

13:56:04 17 THE VIDEOGRAPHER: Going off the record.
13:56:38 18 (Discussion off the record.)

13:56:48 19 THE VIDEOGRAPHER: We are on the record.

13:56:50 20 MR. FITZPATRICK: Dr. DiBacco, I have no
13:56:52 21 further questions. I thank you for your time
13:56:52 22 today.

13:56:56 23 I would like, and I am sure you have
13:57:02 24 agreed that if Dr. DiBacco does read the
13:57:08 25 depositions and does then thereby believe

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DiBacco

13:57:12 2 himself in a position to render and intend to
13:57:14 3 render an opinion with respect to those
13:57:16 4 depositions, I would ask that the defendants,
13:57:18 5 should we so request it, produce him for
13:57:20 6 another deposition to inquire into that
13:57:22 7 subject.

13:57:26 8 MR. ALLINDER: Your request is certainly
13:57:28 9 noted for the record. And as we had discussed
13:57:30 10 before each side has made some reservations
13:57:32 11 with respect to their expert's review and
13:57:34 12 possible preparation to offer opinions on that
13:57:40 13 evidence.

13:57:44 14 As I mentioned to you, and as Dr. DiBacco
13:57:46 15 has testified, he has reviewed some of the
13:57:48 16 depositions. It is our intention to send to
13:57:52 17 him for his review each of the subscriber
13:57:56 18 depositions. When of course he has decided
13:57:58 19 whether he has additional opinions to offer or
13:58:00 20 if he is going to rely on that information we
13:58:02 21 will certainly make a disclosure that's
13:58:06 22 appropriate. And I am sure we will be talking
13:58:08 23 later with respect to all of these experts as
13:58:10 24 to whether there is going to be the necessity
13:58:14 25 of additional depositions of each of them for

DiBacco

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13:58:14 2 that reason.

13:58:16 3 MR. FITZPATRICK: Fair enough.

13:58:16 4 MR. ALLINDER: Okay. I have no

13:58:20 5 questions. And that concludes the deposition,

13:58:20 6 I believe.

13:58:22 7 MR. FITZPATRICK: It does.

8 THE VIDEOGRAPHER: Going off the record.

9 (Witness excused.)

10 (At 1:58 p.m., the deposition was
11 concluded.)

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1
2 STATE OF FLORIDA
3 COUNTY OF DADE

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6 I, the undersigned Notary Public, in and
7 for the State of Florida, hereby certify that THOMAS
8 V. DiBACCO personally appeared before me and was
9 duly sworn.

10
11 WITNESS my hand and official seal this
12 24th day of June, 2000.
13

14
15
16 
17 RICHARD BURSKY, CM, RPR

18 Notary Public - State of Florida

19 My Commission No. CC 759731

20 Expires: July 17, 2002
21
22
23
24
25

C E R T I F I C A T E


STATE OF FLORIDA

COUNTY OF DADE

I, Richard Bursky, a Registered Merit Reporter, do hereby certify that I was authorized to and did stenographically report the deposition of THOMAS V. FIBACCO; and that the transcript is a true and correct transcription of the testimony given by the witness.

I further certify that I am not a relative, employee attorney or counsel of any of the parties, nor am I a relative or employee of any of the parties attorneys or counsel connected with the action, nor am I financially interested in the action.

Dated this 24th of June, 2000.


Richard Bursky
Registered Merit Reporter

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C E R T I F I C A T E

STATE OF FLORIDA
COUNTY OF DADE

I, THOMAS V. DiBACCO, hereby certify that
I have read the foregoing transcript of my
deposition and that the statements contained
therein, together with any additions or corrections
made on the attached Errata Sheet, are true and
correct.

Dated this day of , 2000.

THOMAS V. DiBACCO

The foregoing certificate was subscribed to
before me this day of , 2000, by the
witness who has produced a
as identification and who did not take an additional
oath.

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Expert report of Thomas V. DiBacco, Ph.D.

My name is Thomas V. DiBacco, and I am Professor Emeritus, with a specialization in American history, at American University in Washington, D.C. Graduating with a B. A. (with Highest Distinction) from Rollins College in 1959, I received my M. A. in History (1962) and Ph.D. in History (1965) from American University where I was invited, upon receipt of my doctorate, to accept a full-time position in the Department of History. I remained at American University until my retirement in 1999, progressing from an assistant professor to a tenured full professor. In 1977 I accepted an invitation to teach in the University's College of Business Administration which was present-oriented in its curriculum and limited in the extent to which its students were exposed to values, attitudes, and trends that punctuated the nation's history. Until my retirement in 1999, I taught undergraduate and graduate courses in the Kogod School of Business Administration that focused on the historic relationship of business, government, and society.

I have published four books and more than 2,000 articles in scholarly or popular form regarding American historical subjects. Many of these articles have appeared in numerous newspapers, some nationally distributed, others in leading newspapers in the nation's 50 states. Many of these articles have focused on popular attitudes regarding a wide variety of topics.

My expert testimony will focus on public attitudes toward tobacco products in general and cigarettes in particular as they relate historically to the risks of disease, death, addiction, habituation, and the difficulties of smoking cessation. I will testify that since the earliest times in America, and especially during the last 50 years, claims of health risks associated with smoking have been well publicized, have been and are common knowledge. My testimony is based not only upon my education, teaching, and research over 34 years, but

also on an intensive review of materials, including (but not limited to) the following: nationally-distributed and state newspapers; books, pamphlets, newsletters, and similar publications written to reflect contemporary accounts of the subject matters under consideration

(primary sources) or books, pamphlets, newsletters, and similar publications that reflect research and provide an historical analysis of the subject matters (secondary sources); periodicals, both popular and scholarly; federal and state repositories and sources, with particular reference to statutes and education data such as textbooks, curricula, and films used in public schools; movies, popular culture as revealed in adages, coined phrases, verse, symbols, music, cartoons, and similar displays; public opinion polls; television entertainment and television news and public service programs, and radio entertainment and radio news and public service programs; government documents; religious materials; and manuscript sources.

Long before cigarettes were manufactured, residents on both sides of the Atlantic Ocean were aware of the health risks attributed to tobacco. Bartholomew de las Casas, who was instrumental in the collection of Christopher Columbus' journals, noted that the great explorer instructed his own sailors not to partake of tobacco; Columbus recorded that their response was that "they were unable to cease from using it." English King James I, three years before the Jamestown settlement was founded, issued a critical account, Counterblaste to Tobacco (1604), that pointed out, among others adverse health charges, that smoking was dangerous to the lungs and that coroners performing autopsies had found that heavy smokers were conspicuous for their oily and sooty innards. Colonial Philadelphia physician Benjamin Rush and public servant Benjamin Franklin railed against tobacco usage for health reasons. By the nineteenth century, schoolbooks, and Horatio Alger's highly popular novels for young people, urged youngsters to stay away from products such as tobacco that harmed the body. Early American

religious thought decried tobacco usage on grounds that the body, made in the image of its Creator, was a temple not to be desecrated by harmful substances. The stance of notable Americans added to the awareness chorus: William Lloyd Garrison, the famous abolitionist, and President Abraham Lincoln were against tobacco usage. Even the vice-presiding John Quincy Adams confided in a letter dated August 19, 1845 to one Dr. Cox, a leader in the temperance movement, that he was "addicted to tobacco in two of its mysteries, smoking and chewing, for many years." There was also author Mark Twain's famous lament about the difficulty of stopping smoking. "Quitting is easy," he said. "I've done it hundreds of times."

If tobacco products in the form of cigars, pipes, chewing tobacco, and snuff ignited public awareness about the risks to health, the rise and proliferation of cigarettes by the late nineteenth century solidified public attitudes. Petitions deluged Congress by 1892, urging the body to ban cigarettes. Although the Senate Committee on Epidemic Diseases believed that cigarette smoking is more injurious, especially to youths, than the use of tobacco in any other form, it concluded that it lacked the authority to prohibit the product in states. By 1899, however, anti-cigarette forces were successful in establishing the Anti-Cigarette League, which became a potent force in getting states to outlaw cigarettes, enact legislation to restrict sales to minors, and disseminate educational information. Numerous other organizations, both national and local, were allied with the League, including the No-Tobacco Army, No-Tobacco League, California Anti-Cigarette League, Salvation Army, Young Men's Christian Association, and the Women's Christian Temperance Union. From 1892 to 1930, 37 states and territories had considered laws banning cigarettes and 16 states were actually successful in prohibiting cigarette sales.

By 1930 every state in the United States had passed laws requiring instruction in schools with respect to the adverse health effects of

alcohol and narcotics, with tobacco products in general and cigarettes in particular referenced either as narcotics or as separate entities included under the legislation. Many of these laws had been passed in the decade between 1880 and 1890 when cigarettes for the first time had been mass-produced and widely distributed. Textbooks, many published by leading firms in Massachusetts and New York, arose to meet the state requirements, as illustrated by Frances Gulick Jewett, Control of Body and Mind: Book Five, the Gulick Hygiene Series (Boston, Ginn and Company, 1908):

' . . . You must not smoke cigarettes. It stunts your development, injures your heart, and spoils your wind.'
 . . . To go into the matter a little more precisely—what are some of the most noticeable marks and signs, badges and blights of the cigarette smoker? . . . Marks of the cigarette smoker who has damaged his body: chronic hoarseness, lack of appetite, pallor from impaired blood, rapid and intermittent pulse, pain in the region of the heart, difficulty in breathing, disinclination for healthy, athletic exercise, headache, mental weariness, slowness of thought causing muddled ideas, defective memory, impatience, irritability. No smoker endures within himself all these woes at the same time. Some of them, however, he is likely to have; for boys in every land suffer the same misfortunes from the same causes.

New York state and New York City required teachers to instruct students about the health risks of using tobacco. As early as March 10, 1884, a law was passed that not only made it compulsory for students in every grade to study physiology and hygiene, but specific reference was to be made to the effects of alcohol, stimulants, narcotics, and tobacco upon the body. Another part of the 1884 law required teachers to pass an examination in these areas in order to be certified. Subsequent legislation mandated that the Regents examination have questions on tobacco. New York City published yearly reports which stressed that "health education is a required subject in every school" and delineated certain topics on tobacco to be covered in the various grades.

A junior-high textbook (Junior Health Horizons, O'Keefe et al) published in 1960 and adopted for use in New York state was just one example of the state's carrying out its awareness education on tobacco:

... Smoking may irritate the membranes lining the nose, throat, bronchi, and lungs. An irritated membrane is likely to become infected more easily than one that is not irritated. There has never been any research which shows that smoking is in any way beneficial to anyone. Recently the literature contains numerous reports that deaths from lung cancer are much more common in people who are heavy cigarette smokers than in nonsmokers. Why pick up a habit that is as expensive as smoking? Why make yourself look common? That is what adults and many of your own friends will think of you if you smoke at your age.

A study of 125 health textbooks used in elementary, junior high, and high schools during the period from 1915 to 1955 indicated that the most frequently cited subtopic (112 of 125 books) dealing with tobacco referenced its qualities as a "poison, nicotine, narcotic."

Popular periodicals such as Reader's Digest, touted as "The World's Largest Circulation Magazine," began an even more sophisticated attack on cigarettes by the 1920s. In November 1924, Reader's Digest carried an article that concluded that smoking led to numerous maladies. Perhaps no other best-selling magazine was more consistent and continuing in its anti-cigarette focus, providing readers with suggestions on how to quit smoking (February 1935, August 1938), indicting nicotine as a poison (December 1941), and pointing to the suggested relationship of smoking to cancer (December 1952).

By the 1950s, a series of studies heightened public awareness over the issue of cigarette smoking and disease, specifically, lung cancer. In 1950, Evarts A. Graham, a St. Louis chest surgeon, and Ernest Wynder, a medical student, attracted national attention in an article in the Journal of the American Medical Association, noting that lung cancer patients they surveyed were almost all heavy and longtime smokers. (In 1966 Greater New York's Blue Cross and Blue Shield would sponsor Dr. Wynder's appearance in a television program dealing with "Cancer: Is it Preventable?") Then in 1952, two British researchers, Richard Doll and A. Bradford Hill, concluded in their investigations that the association between heavy cigarette smoking and lung cancer was "real." As for general public awareness of these developments, numerous public opinion

polls confirmed that Americans had read or heard that cigarette smoking could cause cancer.

That widespread public awareness increased as illustrated by songs, movies, and broadcast media reflecting the popular mood. No tune popularized tobacco's depiction as an addictive and deadly product better than 1947's number one song, "Smoke, Smoke, Smoke That Cigarette," which sold two million records. The title phrase was followed with the words, "until you smoke yourself to death." In one verse, a smoked-out and dead victim had to keep St. Peter on hold until he had one more cigarette. Cartoons, such as "Wholly Smoke" (1938), "Popeye Meets William Tell" (1940), "No Ifs, And or Butts" (1947) featuring Buzz the Crow, and "No Smoking" (1952), starring Walt Disney's Goofy, reinforced the anti-cigarette sentiment. The latter cartoon found Goofy as a heavy smoker feeling the adverse health effects of his activity and the difficulty of quitting. CBS News examined the matter of smoking and lung cancer in a two-part series in 1955, hosted by Edward R. Murrow in his "See It Now" program, the "60 Minutes" of its day. CBS continued to run regular news clips and features on updated medical research. And perhaps the most popular American of the era, President Dwight D. Eisenhower, gave the anti-cigarette movement a big boost in 1957 by offering during a news conference his own method for giving up cigarette smoking. "I really believe," said the President, "if persons turn their mind to something else and quit pitying themselves about it, they won't find it nearly as hard to quit smoking as they think it is." Physicians were also beginning to advise their patients about the health risks of smoking, as illustrated by a February 1, 1958 article in the New York Journal of Medicine.

During the next three years, more medical studies argued that heavy smoking caused lung cancer, and like those developments before, these studies were reported to the American people in newspapers and magazines they read, in television programs they watched, and on radio

stations they listened to. Senior Scholastic magazine, perhaps the most widely circulated periodical in public schools, had broached the cigarette-lung cancer issue as early as 1948 when initial scientific studies surfaced. Subsequently, the magazine ran 16 different stories on the subject before the first Surgeon General's report was issued in January 1964.

Perhaps no health report in the twentieth century, or even in American history, received as much publicity as the 387-page report, Smoking and Health, released by U.S. Surgeon General Luther Terry on January 11, 1964. Not only did major newspapers, and even small-town ones, carry the report as its major front-page headline, but anticipation of the report's release provided both magazines and newspapers with fodder for news stories for months earlier. Moreover, research that played a critical part in the report's conclusion had been well publicized earlier, including the studies of Dr. Oscar Muerbach, a New Jersey pathologist who had looked at thousands of slides of lung tissue that led him to conclude that the more a person smoked cigarettes, the greater the damage to lung tissue.

Then, too, the message of Smoking and Health was clear: "Cigarette smoking is causally related to lung cancer in men; the magnitude of the effects of cigarette smoking far outweighs all other factors. The data for women, though less extensive, point in the same direction." The report was followed by not only regular updates by the Surgeon General, but by efforts from various groups--from public health agencies and states to the Heart Association to the Tuberculosis Association to the American Cancer Society, medical societies, even dental groups--to continue to disseminate the antismoking message. The New York State Journal of Medicine, on June 1, 1964, set forth the medical steps that physicians in the state should take in an article entitled "The Physician's Obligation in the Smoking Issue." "These steps can be taken

now," it read, ". . . Advise relatives, friends, and patients convincingly of the immediate and long-term ill effects of smoking." In 1968, Blue Cross Association followed in the direction of concerned physicians by employing pollster Louis Harris to conduct a health survey, two questions of which acknowledged the deleterious health effects of smoking, as well as the difficulty many smokers experienced in quitting:

Question 13 c:

"Even though you know it is bad for your health, do you ever - smoke too much?"

Question 19 c:

"Is this something you feel you should talk over with a doctor or not? . . . Unable to stop smoking."

Additionally, in the 1960s, curricular guidelines of states were strengthened with respect to teaching about tobacco, and educational films were devised to bring the antismoking message to students. And the television and radio media did the same for a much wider audience.

After the first Surgeon General's report, public awareness of the adverse health effects of smoking was also advanced by government, business, and healthcare organizations: the 1965 passage of the Federal Cigarette Labeling and Advertising Act, which mandated the first health warning label; the banning in 1971 of all broadcast advertising for cigarettes; the insertion in 1972 of the Surgeon General warnings in all cigarette advertisements; and the initiation in 1981 of lower insurance rates by insurance companies for nonsmokers. An article in the New York Journal of Medicine on September 1, 1971 reinforced physicians'

commitment to give the smoking message to their patients. "There is a great need for physicians," concluded the article written by three New York physicians, "to give forceful advice to their smoking patients in an effort to convince them to stop. . ." By 1980 Blue Cross and Blue Shield of Massachusetts cooperated with The Medical Foundation, Inc. to develop a publication, Lifestyle and Health: The Physician's Guide to Patient Health Behavior, that stressed that even though "after more than

fifteen years of publicity, it is rare to find a smoker who is unaware of the proven detrimental effects of cigarette smoking on health. . . the doctor's attitudes and beliefs about the patient's ability to quit do have an important bearing on the process of giving up smoking. The physician's confidence that people can stop smoking completely, based on belief in the lifelong human capacity to learn, can be contagious."

This same advice was presented three years later (December 1983) in an article in the New York State Journal of Medicine ("Helping patients withdraw from smoking"). By 1973, smoking cessation clinics for employees were conducted at certain divisions of Hughes Aircraft, General Telephone Company, Prudential Life Insurance, and Blue Cross. By 1977 various Blue Cross Associations were focusing on "preventive health care" in which tobacco usage was proscribed; in the same year the National Association of Blue Shield plans produced a motion picture ("You can't buy health") that stressed lifestyle changes; in 1978 the board of directors of Blue Cross and Blue Shield of Greater New York took note of the use of a new book, Take Care of Yourself - A Consumer's Guide to Medical Care, that was "being offered as only one of several different health care educational and cost containment programs being sponsored by the corporation this year." Empire BC/BS had a Health Education Center and this is the type of information, such as Take Care of Yourself, that was distributed to its subscribers. Four years later, Blue Cross and Blue Shield Associations published a Guide to Staying Well that acknowledged that "an unhealthful lifestyle can be directly responsible for many of our health problems today, such as. . . tobacco. . . " Smoking cessation clinics for many BC/BS subscribers and others were in force by 1982. And in October, 1988, Blue Cross and Blue Shield of the Rochester (NY) area, announced to subscribers the beginning of a "Healthy Choices" program that would assist subscribers in health and wellness programs that included, among others, smoking cessation. A year later Blue Cross/Blue Shield of Central New York initiated a small

business health issues conference to help employers aid employees to change their lifestyles so as to promote good health.

Government efforts in the 1970s and 1980s also added to existing common knowledge about the risks of smoking. Legislation signed and implemented in 1969 strengthened the warning label on cigarettes, and 1985 saw the emergence of additional rotating warnings on labels.

Joseph A. Califano, Jr., Secretary of Health, Education, and Welfare under President Jimmy Carter, was a strong antismoking advocate, and "the Great American Smokeout," a November event in which smokers tried to quit for a day or more and in which Blue Cross and Blue Shield Associations, especially those included in the Empire state rubric, played prominent sponsoring roles, was initiated in 1977 and continues to this day. From 1977 to 1990, the government-supported Public Broadcasting System ran 60 different features on smoking and health, addiction, advertising, Alton Oschner, warning labels, kicking the habit, and Surgeon General C. Everett Koop. Moreover, the 1988 declaration by Surgeon General Koop that cigarette smoking was addictive became another front-page story.

As with other Americans, Blue Cross and Blue Shield subscribers across the nation were not only aware of the health risks of smoking as illustrated by the above-cited history, but were even more exposed to such risks through publications ranging from newsletters to pamphlets specifically written and printed for their use by Blue Cross and Blue Shield administrations. Indeed, Blue Cross and Blue Shield Associations were conduits of consistent smoking and health messages to their subscribers that stopping smoking would improve health and decrease costs.

In sum, from the evidence I have examined (only a small portion of which has been cited above), claims of health risks and the habit-forming nature of tobacco products have been well-publicized from earliest times in America. Early American literature not only


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emphasized these untoward aspects, but public awareness was continued with the cigarette's mass production in the late nineteenth century. And with the rise of medical reports in the twentieth century suggesting cigarettes' harmful effects, the public awareness campaigns became so widespread--thanks, in part, to more and widely disseminated forms of communication--that the linkage of tobacco in general and cigarettes in particular to health risks and habit-forming dangers became common knowledge.

I am continuing to review depositions and case-related materials which may be identified in a supplemental exhibit list.

I have been deposed in two cases involving tobacco-company litigation, to wit: Norma R. Broin et al vs. Philip Morris Companies, Inc., et al (Case No. 91-49738 CA 22) in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida; and Howard A. Engle, M.D., et al vs. R.J. Reynolds Tobacco Company et al (Case No. 94-08273 CA 22) in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida.

For my services, as an expert, I am paid \$75.00 per hour for research; \$90 to a maximum of \$110 per hour for meetings, depending on preparation necessary for same; and \$125 per hour for appearances in depositions and trials.



Thomas V. DiBacco, Ph.D.

Date: January 13, 2000

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Education:

B.A., with highest distinction, Rollins College, 1959
M.A., Ph.D., The American University, 1962, 1965

Employment History:

Staff Assistant, (Washington, D.C.) U.S. Senator Spessard L. Holland (FL), 1959-64
Instructor, University of South Florida, 1964-65
Assistant Professor, The American University, 1965-69; Associate Professor, 1969-77;
Dean for Faculty Affairs, 1974-81; Professor, Kogod College of Business
Administration, 1977--

Teaching Specialties:

United States History
History of Business and Technology, Social and Economic History

Publications:

Four Books.

Most recent: History of the United States (1997, Houghton Mifflin), a high school textbook.

Made in the U.S.A.: The History of American Business (1987, Harper Row); two hardback printings with paper edition issued in March 1988; the United States Information Agency purchased the rights to translate 20,000 copies in Chinese.

Articles:

Over 2,000 articles in scholarly and popular form, including Harvard's Business History Review, Journal of Politics, Journalism Quarterly, Wall Street Journal, New York Times, Washington Post, Christian Science Monitor, Philadelphia Inquirer, Boston Globe, Newsday, Chicago Tribune, Baltimore Sun, Baltimore Evening Sun, Chicago Sun-Times, Los Angeles Times, Chronicle of Higher Education, USA Today, San Francisco Chronicle, Richmond Times Dispatch, Miami Herald, Palm Beach Post, Virginia Pilot, Hartford Courant, Pittsburgh Post-Gazette, Indianapolis Star, Washington Times, Orlando Sentinel, St. Louis Post-Dispatch, Richmond News-Leader.

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Consultant Activities:

American Council on Education
Business Council for International Understanding
Foreign Service Institute, U.S. Department of State
National Endowment for the Humanities
International Institute of Education
Meridian House International
National Geographic Society
National Science Foundation
U.S. Information Agency
Washington, D.C. business firms
Nationwide Fortune 500 business firms

Media Activities:

Regular radio and television participation, including Good Morning America, Today show, NBC Nightly News, CNBC.

Featured speaker in University of Notre Dame's film, "Today's Life Choices: Legislating Morality," Golden Dome Productions, 1996

Frequent speeches and panel discussion participation

Honors and Special Recognition:

Best Professor, The American University, selected by Senior Class, 1971
Chairman, University Faculty Senate, The American University, 1973-74
"America, the Second Century" television series (one segment with Robert Hellbroner)-
winner of the Bronze Medal, New York Film and Video Festival, 1980
Honors Convocation Awards, Kogod College of Business Administration, The American
University, Outstanding Program Development (1981) and Scholarship (1982)
Distinguished Alumni Award, Rollins College, 1983

Personal:

Married, 1959, Mallie Z. Rowe, Ph.D.
Two children: Deborah, Paris-based attorney, and Thomas, ABC (Washington, D.C.)
TV editor and producer
Three grandchildren

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